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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 481

GUY A. THOMPSON, TRUSTEE, MISSOURI-ILLINOIS RAILROAD COMPANY, DEBTOR, PETITIONER,

vs.

MAGNOLIA PETROLEUM COMPANY AND THE OHIO OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 23, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

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[fol. a] [Caption omitted]

[fol. 1] Citation and service on Appeal of Magnolia Petroleum Company, dated December 12, 1938, omitted in printing.

[fol. 2] Citation and service on Appeal of Ohio Oil Company, dated December 12, 1938, omitted in printing.

IN DISTRICT COURT OF THE UNITED STATES, EASTERN DIVISION, EASTERN JUDICIAL DISTRICT OF MISSOURI

PETITION OF TRUSTEE FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT-OF-WAY NEAR SALEM, ILLINOIS—Filed November 1, 1938.

[Petition No. 1167]

[fol. 3] In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, and presents to the Court:

That by petition duly filed and approved in these proceedings June 30, 1933, Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the laws of the State of Missouri and doing business in the State of Illinois, became a subsidiary debtor in these proceedings under the provisions of Section 77 of the Bankruptcy Act, and the undersigned is now the duly appointed, qualified, and acting trustee of said subsidiary debtor.

That by orders heretofore entered in these proceedings (Order No. 122, Rec. p. 789, and Order No. 407, Rec. p. 3157), Trustee has been granted blanket authority to enter into gas and oil leases and to contract for the drilling of

oil wells on the rights-of-way of the various debtor companies. The right-of-way of the Missouri-Illinois Railroad now traverses certain territory in the State of Illinois where oil deposits under the ground have been proved to exist in paying quantities. Trustee has accordingly solicited bids for lease of oil rights upon that part of the right-of-way of the Missouri-Illinois Railroad which ranges from 60 to 66 feet in width and extends diagonally northeast to southwest across the Northeast Quarter and the South-east Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 20, Township 2 North, Range 2 East of the third principal meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

Certain oil companies claiming to own title to the oil and mineral rights in and underlying said premises (to-wit, The Ohio Oil Company, with offices at Findley, Ohio, the Kingwood Oil Company, with offices at Mattoon, Illinois, and the Magnolia Oil Company, with offices in Magnolia Building, Dallas, Texas), have served notice upon Trustee [fol. 4] questioning Trustee's right and title to the oil in and under said right-of-way, and Trustee is advised and believes that there may be other parties, unknown by name to Trustee, who now contend or will contend that they own certain interest in portions of the oil, gas and mineral rights underlying said right-of-way, and because of these possible adverse claims, Trustee now seeks advice and directions of the Court in the premises.

Missouri-Illinois Railroad Company, by conveyances and decrees of record, had, at the time it became a subsidiary debtor in these proceedings as aforesaid, and Trustee has now, duly succeeded to all of the title to the lands hereinafter described originally vested in The Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of railroad in Marion County, Illinois now owned and operated by petitioner as Trustee, and in addition thereto, petitioner and Missouri-Illinois Railroad Company own such additional rights to the property hereinafter described as have been acquired through adverse possession.

Title of The Centralia & Chester Railroad Company to the property in question is traced back to the following conveyances, to-wit:

Warranty Deed, dated Januar 28, 1898, recorded November 5, 1900, at page 533 in Volume 60 of Record of Deeds, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of $300.00 to The Centralia & Chester Railroad Company, the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company Sixty feet wide over and across The North half (½) of the North East quarter (¼) of Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, where said Railroad is now located."

Warranty Deed, dated August 13, 1896, recorded November 19, 1897, at page 261 in Volume 55 of Record of Deeds, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of $150.00, conveyed to The Centralia & Chester Railroad Company, [fol. 5] the following described real estate in Marion County, Illinois, to-wit:

"'A strip of Land for right of way for said Railroad Company Sixty feet wide over and across the South West quarter (¼ of the North East quarter (¼) of Section Twenty (20) Town Two (2) North, Range Two (2) East of the third principal Meridian."

Warranty Deed, dated August 14, 1896, recorded Novemr 19, 1897, at page 260 in Volume 55 of Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of $100.00, conveyed to The Centralia & Chester Railroad Company the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground Sixty six (66) feet wide for Right of way for said Railroad Company over and across the East half (½) of the North West quarter (¼) of the South West Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the third principal Meridian."

Warranty Deed, dated January 3, 1898, recorded January 25, 1898, at page 577 in Volume 56 of Record of Deeds, Marion County, Illinois, wherein Caroline Rusler, a widow,

for the consideration of $120.40, conveyed to The Centralia & Chester Railroad Company, the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company Sixty feet (60) wide over and across the South East Quarter (¼) of the North East quarter (¼) and the West half (½) of the North West quarter (¼) of the South West Quarter (¼) and the South East quarter (¼) of the North West (¼) Quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located."

Within a short time after the conveyances aforesaid and thereafter down to the present time, the aforesaid lands so conveyed, so Petitioner is advised and believes, have been fenced and used by Trustee and his predecessors in [fol. 6] interest without interruption, and with actual visible and exclusive possession acquired under claim of title inconsistent with the claims of title of any other owner for at least 20 years prior to institution of these proceedings.

Petitioner is advised and believes, and therefore avers, that as Trustee, Missouri-Illinois Railroad Company, Debtor, he is now lawfully vested with title to all of the oil and mineral rights under the land herein referred to.

Petitioner is advised and believes that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying said right-of-way, it will be drained into the wells on adjacent lands, and the value thereof will be forever lost to the stockholders and creditors of the Missouri-Illinois Railroad Company.

This court of bankruptcy, by reason of Trustee's possession of said property, has jurisdiction, under Section 77 of the Bankruptcy Act, to determine all questions respecting title thereto, and pending the determination of said title, has jurisdiction to instruct and direct Trustee to take such action as the Court may deem advisable to prevent the waste of said oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined, and has authority to direct that the expenses thereof be paid out of the proceeds of the oil so recovered. It is not, in the opinion of Trustee, practicable

or advisable to await the adjudication of adverse claims and the possible review of this Court's decision respecting title before beginning the drilling for oil upon said right-of-way.

After a careful analysis of the various bids hereinabove referred to, and having due regard for financial backing, experience, and reputation of the bidders, and the terms and conditions offered, Trustee is advised and believes that the bid most favorable to the trust estate is that made by the Blackstock Oil Company.

Subject to the approval of this Court, Trustee has therefore negotiated a contract with Blackstock Oil Company, copy of which is filed herewith as "Exhibit A", which con- [fol. 7] tract, because of the adverse claims to title, has been divided into three parts or articles, to-wit:

Article I is applicable pending determination by this Court of petitioner's title to the premises in question, and is further applicable pending appeal, if appeal be taken. It provides, among other things not herein set out, the number and description of the wells to be drilled, the conditions safeguarding continued operation of the railroad, conditions respecting claims and damages and requiring public liability insurance, provisions respecting operation of the wells, marketing of the oil, and payment of the proceeds over to Trustee, and with respect to the consideration to be paid by Trustee to Contractor therefor provides:

"(1) Drilling and Equipment Cost

a. Price per foot depth of well	$3.25
b. Well connections and flow lines in place, lump sum per well	350.00
c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well	200.00
d. Trucking expense incident to drilling and completing the well, lump sum per well	200.00

e. Actual invoice cost of:

Surface pipe,
Casing pipe,
Cementing surface-pipe and casing,
Rental of cable tools at $5.00 per hour based on actual hours in use,
Tubing,

Tanks and separator,
Public liability.

f. 10 per cent for accounting and supervision.

The total estimated cost of completing well, exclusive of pumping unit and appurtenances, is $12,800 to the Benoist Sand, and $14,400 to the McCloskey Limestone.

[fol. 8] "(2) Operating cost of producing oil after drilling is completed

a. $25.00 per month per well to cover cost of accounting and bookkeeping at our main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow.

c. 15¢ per barrel on all oil produced for all other operating costs of production.

"(3) Gathering and marketing cost

a. Actual cost, plus 10 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the wells tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

b. Actual transportation expense from loading track to destination.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month.

d. All State or Federal taxes on production or marketing of oil.

"(4) Interest at the rate of six (6) per cent per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices."

Article II is in the nature of an oil and gas lease, and is intended to be applicable retroactively from the date of the contract in the event Trustee's title to the premises be upheld by this Court, and in such event it is to supersede the provisions of Article I, and payments theretofore made

under Article I are to be credited and readjusted to conform with the provisions of Article II. Article II, like the preceding article, provides, among other things not herein set out, the term of the lease, the number and description of wells to be drilled, conditions safe-guarding continued operation of the railroad, conditions respecting claims and damages and the giving of public liability insur-[fol. 9] ance, and with respect to the consideration to be paid by Lessee to Trustee provides:

"In consideration of the premises, Lessee covenants and agrees during the entire term hereof:

"(a) To deliver to the credit of Lessor, free of cost, in the pipe line to which each well on this lease is connected, or in tank cars in which such oil is loaded for transportation, the equal twenty nine-sixty fourths (29/64th) part of all oil produced, saved and marketed from the leased premises, provided Lessee can produce and sell from all producing wells on the leased premises an average of more than thirty (30) barrels per well per day; and twenty two-sixty fourths (22/64) of all oil produced and saved from the described premises, if Lessee produces and sells from all producing wells an average of thirty (30) barrels or less per well per day; it being understood and agreed by and between the parties hereto that in arriving at the average per well per day basis for any period during the term of this lease that it will be based upon a pipe line month, said pipe line month not to exceed thirty-one (31) days, that is to say, each month Lessee is able to produce and sell an average of more than thirty (30) barrels of oil per well per day, Lessor shall receive said twenty nine-sixty fourths (29/64) of the oil produced and sold from said premises and that any month during the life of said lease the Lessee is not able to produce and sell from said wells an average of more than thirty (30) barrels of oil per well per day, then for each month Lessor shall receive twenty two-sixty fourths (22/64) of the oil produced and sold from said premises during such month;

"(b) To pay Lessor for gas produced from any well, including that used for the manufacture of casinghead gasoline, the equal twenty nine-sixty fourths (29/64) part of the gross proceeds realized from the sale thereof so long as Lessee has been able to produce and sell from said prem-

ises said average of more than thirty (30) barrels of oil per day per well during the month and the equal twenty two-sixty fourths (22/64) part of the gross proceeds realized from the sale of said gas and casinghead gasoline during such months that the Lessee has not been able to produce and sell an average of thirty (30) barrels of oil per well per [fol. 10] day; it being further understood and agreed by and between the parties hereto that any sale of gas or casinghead gasoline will be pursuant to the terms and conditions of an agreement with the purchaser of such gas having mutual approval of the parties hereto; and

"(c) To store and market, free of expense to Lessor, all royalty oil produced hereunder in the same manner as it stores and markets its own oil, whenever Lessor does not elect to take the same in kind, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, or at such other and different price or prices as shall have been approved, from time to time, by Lessor in writing; such payments to be made to Lessor at Lessor's Office in St. Louis, Missouri, on or before the fifteenth (15) day of the month succeeding such production."

Article III, which is self-explanatory, provides:

"In the event that Principal's title to oil rights on the premises in question be upheld in part and rejected in part by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri in proceedings more fully described in Article I hereof, and be affirmed on appeal, if appeal be taken thereupon, if either party to this contract is of the opinion that a fair and equitable disposition of the rights of the contracting parties with respect to the oil rights that have been sustained requires some modified application of the provisions of Article II, then the parties hereto shall attempt to agree upon such modified terms and conditions so as to meet such exigencies and equities of the situation, and failing to agree, shall present their differences to the administrative judge in the aforesaid proceedings and shall abide by his determination as to what is fair and equitable, with due regard for the intents and purposes of the agreement of lease expressed in Article II of this agreement, and with due regard for changes therein made necessary by any defects in title. Any such agreement or ruling of the Court with respect

thereto shall, in so far as possible, be retroactively applicable from the date of this agreement, and accounting shall be adjusted pursuant to such agreement or ruling of the Court."

[fol. 11] Wherefore, Trustee respectfully recommends:

(1) That this Court issue its subpoena to The Ohio Oil Company, to the Kingwood Oil Company, and to the Magnolia Oil Company, and by such publication or other notice as the Court may direct addressed to any other adverse claimant, require that they and each of them appear and file written return, upon a day to be fixed by the Court, showing cause, if any they have, why this Court should not find and decree that all oil, gas and mineral rights in and under the aforesaid right-of-way, in and across the aforesaid Section 20, Township 2 North, Range 2 East, Salem Township, Marion County, Illinois, are now vested in petitioner as Trustee, Missouri-Illinois Railroad Company, Debtor, and directing that upon failure to show such cause, they be estopped and enjoined from asserting any further title in and to the land over and upon which said right-of-way is located or to the mineral, oil or gas deposits in and under said right-of-way or extracted therefrom.

(2) That Trustee be authorized to forthwith execute contract with Blackstock Oil Company substantially in the form of Exhibit A filed herewith, and, as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract.

(3) That Trustee, pending determination of adverse claims to title, be authorized to sell and convey and to transfer title to any oil or gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in said premises.

(4) That Trustee be directed to keep separate account of the expense of drilling each well, and to keep separate account of all oil and gas removed from each separate tract to which adverse claim is herein asserted, and that Trustee, after paying the expense provided for in Article I of the contract herewith filed as Exhibit A, and such other ex-

penses as may be reasonably necessary in removing, conserving, and marketing the oil or gas from said premises, reimburse himself therefor out of the proceeds of the sale [fol. 12] of said oil and/or gas, and that Trustee be directed to hold the remainder of said proceeds for the account of whom concerned as may hereafter be determined by appropriate orders of this Court.

(5) That this Court enter such further order and grant such further relief as may by the Court be determined to be proper in the premises.

Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor; Russell L. Dearmont, Counsel for Trustee.

Duly sworn to by Guy A. Thompson. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

This Agreement, executed in duplicate this — day of ——, 1938, by and between Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, as trustee and not individually, with offices in Missouri Pacific Building, St. Louis, Missouri, (hereinafter called Principal), and Blackstock Oil Company, a corporation duly organized under the laws of the State of Oklahoma, with principal office in Milam Building, San Antonio, Texas, (hereinafter called Contractor), Witnesseth:

Whereas, Principal now owns or asserts fee title to the following described lands, situated in Marion County, Illinois, herein sometimes called "Premises" or "leased premises" and located substantially where shown by yellow lines [fol. 13] on Principal's blue print File No. 9-8702, dated October 1, 1938, marked Exhibit A, attached hereto as part hereof, to-wit:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the center line of main track of said Principal, over, through and across the NE¼, and the SE¼ of the NW¼, and the W½ of the NW¼ of the SW¼ of Section 20, Township 2 North, Range 2 East of the Third Principal Meridian; also a strip of land sixty-six (66) feet wide, thirty-three (33) feet on each side of said center line, over,

through and across the E½ of the NW¼ of the SW¼ of said Section 20.

Principal owns or asserts title to all the minerals in Premises and to all or all portions of minerals in Premises in and to which title adverse to Principal is now being asserted by the Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company, severally, and the parties hereto are advised that there may be other adverse claimants in and to said minerals whose names and alleged interests are at present unknown.

Pending determination of Principal's title in and to said minerals, and in the event of a decision adverse to Principal with respect to said title, it is the desire of the parties hereto to be governed by the provisions of Article I of this agreement.

In the event Principal's title to the said minerals shall be upheld, then it is the desire of the parties hereto to be governed, retroactively from the date of this agreement, by the provisions of Article II of this agreement.

In the event Principal's title to the said minerals shall be upheld in part and denied in part, then it is the desire of the parties hereto to be governed, retroactively from the date of this agreement, by the provisions of Article III hereof.

Now, Therefore, in consideration of the premises, and of the mutual covenants hereinafter contained, by each of the parties hereto to be kept and performed, the parties hereto have covenanted and agreed and do hereby covenant and agree as follows:

[fol. 14] Article I

1. Pending determination of Principal's title to said minerals, pursuant to a Petition filed or to be filed by Principal in Cause No. 6935 pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, entitled 'In the Matter of Missouri Pacific Railroad Company, Debtor, In Proceedings for the Reorganization of a Railroad'' and pending final determination of any ruling of said Court with respect to said title, on appeal:

(a) Contractor, furnishing all necessary instrumentalities, labor, materials, supplies and insurance, without cost or expense to Principal other than the remuneration

to be paid Contractor by Principal as expressed in paragraph (o) of this Article I, shall, and Contractor hereby agrees, to commence, within fifteen (15) days from the date of this agreement, operations for drilling an oil or gas well on Premises, and to prosecute such drilling operations with diligence and in a workmanlike manner until such well shall be completed to the Benoist Sand underlying Premises, unless oil or gas is found in paying quantities at a lesser depth. If operations are not so commenced and not so continued, then all rights of Contractor hereunder shall cease and terminate.

(b) Further, within fifteen (15) days after such first well is completed, Contractor agrees to commence and to continue to drill a second well in like manner and to like depth, and thereafter to continue to drill other wells, but not less than six (6) other wells on the Premises to the Benoist Sand, and so that no more than fifteen (15) days shall elapse between the completion of any one well and the beginning of another. If operations are not so begun and diligently continued, then all rights of Contractor hereunder shall cease and terminate.

(c) Further, Contractor shall and hereby agrees to proceed, with diligence and dispatch and in a workmanlike manner to drill and complete at least one well to the depth of any oil producing horizon underlying Premises, such drilling to be commenced by Contractor within fifteen (15) days after the completion of a commercial producing oil well to such [fol. 15] producing horizon on any forty (40) acres in which any part of Premises is located; provided that Contractor shall not be required to drill more than (5) wells to develop the property to the "McCloskey" horizon underlying Premises. No well shall be drilled to and operated from more than one producing horizon without the consent in writing of Principal's Chief Engineer.

(d) Contractor agrees fully to protect the boundary lines of Premises by promptly drilling opposite any commercial producing oil well within 330 feet of the boundary lines of Premises, and within ten (10) days from the completion of such well, or, if a well is then being drilled on Premises within ten (10) days from the completion of such well then being drilled on Premises, Contractor shall commence the drilling of the necessary offset well hereun-

der, unless such location has already been drilled or condemned; it being understood and agreed that in no event shall Contractor be required to have more than four (4) offset drilling operations on Premises at any one time and that Contractor shall not be required to drill a total of more than seven (7) offset wells to the Benoist Sand in addition to the eight (8) wells required to be drilled, completed and operated pursuant to the provisions of sub-paragraphs (a) and (b) of this Paragraph 1. Contractor shall not be required to drill a total of more than four (4) offset wells to the McCloskey horizon in addition to the five (5) wells required to be drilled, completed and operated pursuant to the provisions of sub-paragraph (c) of this Paragraph 1.

(e) All operations by Contractor hereunder shall be according to the following terms and conditions:

(1) Wells, pipe lines, and all other structures and equipment shall be located by Contractor on the Premises only at such places as shall be approved from time to time in advance by Principal's Chief Engineer in writing.

(2) Contractor agrees at all times to conduct its operations hereunder in conformity with the requirements of Federa' State, County and Municipal authority, and to comply with all valid rules and regulations of the Illinois Commerce Commission.

(3) Contractor shall not complete any well on the Premises without notifying Principal's Chief Engineer at [fol. 16] St. Louis, by telegraph at least twenty-four (24) hours before such completion, and Contractor agrees to carry out such completion only during such period as may be specifically designated by Principal after receiving said telegraphic notice. Contractor shall drill and complete all wells on the Premises with every possible precaution and in the most approved manner, so as to avoid all risk of explosion, fire or other catastrophe, and so as not to interfere with the safe and convenient operations of Principal. After completion, all producing wells shall, where practicable, be enclosed in sheet-iron houses, and the same shall be kept securely locked.

(4) Contractor agrees to keep the Premises at all times clean and safe from waste oil, and to store all oil produced

hereunder a sufficient distance from the Premises to insure safe operation of trains thereover, and to take all possible precautions against hazard of fire, explosion or other catastrophe.

(5) Contractor agrees not to shoot, treat or rework any well on the Premises without notifying Principal's Chief Engineer at St. Louis, Mo., by telegraph at least twenty-four (24) hours in advance, and to carry out such operations only during such period as Principal may specifically designate after receiving said telegraphic notice. Contractor further agrees to use every possible precaution and the most approved methods in carrying out such operations, so as to avoid all risk of fire, explosion or other catastrophe, and so as not to interfere with the safe and convenient operations of Principal.

(6) Contractor agrees that it will not interfere with the telegraph, telephone and signal lines, or other structures, upon the Premises, or with the operation of said facilities. In case Principal's Superintendent, in writing, after written application of Contractor, approves the movement or rearrangement of any of said facilities, to permit of Contractor's operations under this lease, the work shall be done or caused to be done by Principal at Contractor's cost, and Contractor on rendition of bills shall reimburse and pay to Principal the cost of said work, including the Principal's then customary charges and surcharges for labor and material and, also, for use of equipment em- [fol. 17] ployed on the work and excise taxes on labor and materials.

(7) Contractor hereby agrees that it will not interfere with the use and occupancy of the Premises by Principal or anyone thereon by Principal's authority, nor with the property thereof, and will promptly pay any damages resulting from its failure so to do.

(8) Any storage tank, flow tank, oil sump or separator shall be built or installed by Contractor only at such place on Premises as shall be approved, in writing, by Principal's Chief Engineer.

(f) Contractor hereby releases and discharges Principal, Principal's tenants and invitees, from all liability because of any loss of or damage to Contractor's property, or of

others in its possession, delay to Contractor's operations, and injury to or death of Contractor's employes, and Contractor will indemnify and save Principal harmless from and against all actual expenses and claims because of loss of or damage to property, including that of Principal, or of others in Principal's possession or on Principal's property, and because of injury to or death of persons, including Principal's employes and passengers on Principal's trains, and Principal's tenants and invitees and their employes, growing out of, arising from, or in any way incident or attributable to the operations of Contractor, whether such loss, damage, injury or death be caused or contributed to by negligence or otherwise, and will promptly repay any sum or sums which Principal, Principal's tenants and invitees, may pay or be compelled to pay, and discharge any judgment or judgments that may be rendered against Principal, Principal's tenants and invitees, including all costs and attorney's fees, because of any such claim or claims. No other provision of this contract shall be construed to waive or limit the liability of Contractor as defined in this paragraph.

(g) Contractor further agrees at Contractor's own expense to carry insurance at all times in a company or companies approved by Principal, protecting Principal, Principal's tenants and invitees, and Contractor against the [fol. 18] liability involved in the next preceding paragraph, with limits of $50,000.00 for one person and $100,000.00 for one accident for personal injuries, and $50,000.00 for property damage, and to furnish Principal true original counterparts of such policies and have Principal's written approval of said policies at least forty-eight (48) hours before entering the said Premises hereunder.

(h) Contractor further agrees to at all times, at Contractor's own cost and expense, defend, fully indemnify and save harmless the Principal, Principal's successors and assigns, from all claims, damages, actions or causes of action arising or in any manner growing out of the operations of Contractor in the production or removal of oil in, on or from the Premises.

(i) Contractor further agrees that Contractor will not create, suffer or permit the creation of any lien, either contractual, constitutional, statutory, or of any other sort whatsoever, on the Premises hereby leased, or on any part

thereof, or on any tools, casing, pipe or other equipment of any sort whatsoever used or about to be used on the Premises.

(j) It is understood and agreed that neither any of the duties and responsibilities nor any of the rights, of Contractor hereunder, shall be transferred or assigned by Contractor in whole or in part except with written consent of Principal. The appointment of a receiver or a trustee in bankruptcy for Contractor, shall be construed to be a violation of the covenant against assignment.

(k) Contractor covenants and agrees, at all times during the term hereof, and as one of the considerations for the remuneration to be paid Contractor by Principal pursuant to the provisions of this Article I, (a) to deliver in the pipe line to which each well on Premises is connected, or in tank cars in which oil is loaded for transportation, all of the oil produced and saved from Premises, (b) to market, sell and dispose of all of the said oil and all gas, including that used for the manufacture of casinghead gasoline, produced hereunder, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, and the highest prevailing market [fol. 19] price paid from day to day for gas produced, including that used for the manufacture of casinghead gasoline, provided, however, that the said oil, gas, or gas used for the manufacture of casinghead gasoline, may be sold by the Contractor at such other and different price or prices, from time to time, as shall have been approved by Principal in writing, and (c) to pay to Principal on or before the fifteenth (15th) day of each month the amount of the gross proceeds realized from the sale of the oil produced hereunder during the preceding month, and on the twentieth (20th) day of each month the amount of the gross proceeds realized from the sale of gas, including that used for the manufacture of casinghead gasoline, produced hereunder during the preceding month; and it is expressly agreed that any payments not so made to Principal, within ten (10) days after such fifteenth (15th) day or within twenty (20) days after such twentieth (20th) day, as the case may be, shall bear interest at the rate of six per cent (6%) per annum from such due date until paid, but this provision shall in no manner waive or extend the specific due dates of such payments.

It is expressly understood and agreed that if any oil owned by or held for the account of Principal is to be sold in any manner that will require shipment in interstate commerce via Missouri-Illinois Railroad such sales shall provide for and be conditioned upon delivery to and acceptance by the purchaser or purchasers of such oil at the point of shipment on Missouri-Illinois Railroad, and none of said oil shall be sold on a delivery basis.

(l) Contractor shall have the free use of oil and gas for all of Contractor's operations hereunder on the Premises.

(m) Contractor shall furnish Principal with the logs of all wells drilled by Contractor hereunder. Actual production from each quarter Section in which any part of Premises is located shall be kept and reported separately. Principal's authorized representatives shall at all reasonable times during office hours have access to Contractor's books and records relating to the production, sale and delivery of oil and gas under the provisions of this agreement.

[fol. 20] (n) Should Contractor fail in any manner to perform any of the Contractor's obligations herein provided for, then at the option of Principal, after five (5) days written notice, mailed to Contractor at Milam Building, San Antonio, Texas, or delivered to any employe of Contractor, of the grade of foreman, or above, on Premises, and Contractor's failure to correct the matter complained about, Principal may declare this contract terminated in its entirety, but without prejudice to any accrued liability.

(o) For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractors' performance of Contractor's undertakings as in this Article I expressed and set forth, during each calendar month of term hereof, Principal shall pay to Contractor and Contractor accept, on or before the fifteenth (15th) day of the next succeeding calendar month, payments to be determined as follows, to-wit:

(1) Cost of Each Well Completed During Such Calendar month.

a. Price per foot depth of well	$3.25
b. Well connections and flow lines in place, lump sum per well	350.00

c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well 200.00

d. Trucking expense incident to drilling and completing the well, lump sum per well 200.00

e. Actual invoice cost of:

Surface pipe,

Casing pipe,

Cementing surface pipe and casing,

Rental of cable tools at $5.00 per hour based on actual hours in use,

Tubing,

Tanks and separator,

Public liability.

[fol. 21] f. 10 per cent for accounting and supervision.

(2) Operating Cost of Producing Oil After Drilling Is Completed.

a. $25.00 per month per well to cover cost of accounting and bookkeeping at Contractor's main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow.

c. 15¢ per barrel on all oil produced for all other operating costs of production.

(3) Gathering and Marketing Cost.

a. Actual cost, plus 10 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the well tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

b. Actual transportation expense from loading track to destination, subject to the provisions of sub-paragraph (k) of Paragraph 1 of this Article I.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month.

d: All State or Federal taxes on production or marketing of oil.

(4) Interest at the rate of six per cent (6%) per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices.

Article II

In the event Principal's title in and to the said minerals be upheld by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, in the Proceedings more fully referred to in Article I hereof and such title be affirmed on appeal, if appeal be taken, then, retroactively from the date of this agreement, and superseding the covenants and agreements of the Prin-
[fol. 22] cipal and Contractor as in Article I hereof expressed and set forth, Principal, hereinafter in this Article II referred to as "Lessor", and Contractor, hereinafter in this Article II referred to as "Lessee", mutually covenant and agree, as follows:

1. Lessor, acting pursuant to Orders of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in Cause No. 6935 pending in said Court, entitled "In the Matter of Missouri Pacific Railroad Company, et als., Debtor,". in consideration of Fifty Dollars ($50.00), cash in hand paid by Lessee, and of other valuable considerations, of the royalties hereinafter provided and of the agreements of Lessee hereinafter contained, subject to the further provisions hereof, hereby grants, leases, and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling, mining for and producing oil and gas, laying pipe lines and building structures thereon to provide, save, take care of, transport and own said products, the following described lands situated in Marion County, Illinois, herein sometimes called "leased premises" and located substantially where shown by yellow lines on Lessor's blue print File No. 9-8702, dated October 1, 1938 marked Exhibit A, attached hereto as part hereof, to-wit:

A strip of land sixty (60) feet wide, thirty (30) feet on each side of the center line of main track of said Lessor, over, through and across the NE¼, and the SE¼ of the NW¼, and the W½ of the NW¼ of the SW¼ of Section 20, Township 2 North, Range 2 East of the Third Principal Meridian; also a strip of land sixty-six (66) feet wide, thirty-three (33) feet on each side of said center line, over, through and across the E½ of the NW¼ of the SW¼ of said Section 20,

save and except therefrom such part thereof as may from time to time be used for railroad purposes.

2. Subject to the provisions herein contained, this grant shall remain and continue in full force and effect for a term of sixty (60) days from the date of entry of the aforesaid final decree, subject to extension by Lessor for causes beyond Lessee's control, and so long as continuous drilling operations are prosecuted as hereinafter provided and only [fol. 23] so long thereafter as oil or gas is produced from the leased premises in paying quantities.

3. It is understood and agreed that any and all producing oil wells which shall have been drilled on the leased premises by Lessee while acting as Contractor pursuant to the provisions of Article I of this agreement, shall to the extent of the number, location and character thereof be deemed and held to be fulfillment, pro tanto, by Lessee of Lessee's obligations under paragraphs 4, 5, 6 and 7 of this lease, and, subject to such pro tanto allowance and credit for the producing oil wells so drilled, Lessee shall and hereby agrees to keep and perform all of Lessee's covenants and agreements in said paragraphs 4, 5, 6 and 7 expressed and set forth.

4. Lessee agrees to commence operations for drilling an oil or gas well on the leased premises within fifteen (15) days from the effective date of this lease, as expressed in paragraph 2 hereof, subject to extension by Lessor for causes beyond Lessee's control, and to prosecute such drilling operations with diligence and in a workmanlike manner until such well shall be completed to the Benoist Sand underlying the leased premises. If operations are not so commenced, and not so continued, then all rights of Lessee hereunder shall cease and terminate, and Lessee shall have no further rights in the leased premises.

5. Further, within fifteen (15) days after such first well is completed, Lessee agrees to commence and to continue to drill a second well in like manner and to like depth and thereafter to continue to drill other wells, but not less than six (6) other wells on the leased premises to the Benoist Sand, and so that no more than fifteen (15) days shall elapse between the completion of any one well and the beginning of another. If operations are not so begun and diligently continued, then all rights of Lessee hereunder shall cease and terminate, and Lessee shall have no further right in the premises; provided, however, that any such default by Lessee shall not affect Lessee's rights in and to any well or wells previously completed hereunder, but Lessee shall retain such well or wells subject to the other terms and conditions hereof, together with an area around each such producing well which measures not more than 50 feet [fol. 24] perpendicular to the center line of Lessor's main railroad track, shown on Exhibit "A", and 150 feet parallel to the center line of said main railroad track but not exceeding 75 feet on each side of the well, such area in no event extending across the center line of the main railroad track or beyond Lessor's property limits.

6. Further, Lessee shall and hereby agrees to proceed with diligence and dispatch and in a workmanlike manner to drill and complete at least one (1) well to the depth of any oil producing horizon underlying the leased premises, such drilling to be commenced by Lessee within fifteen (15) days after the completion of a commercial producing oil well to such producing horizon on any forty (40) acres in which any part of the leased premises is located; provided that Lessee shall not be required to drill more than five (5) wells to develop the property to the McCloskey horizon underlying the leased premises. No well shall be drilled to and operated from more than one producing horizon without the consent in writing of Lessor's Chief Engineer.

7. Lessee agrees fully to protect the boundary lines of the leased premises by promptly drilling opposite any commercial producing oil well within 330 feet thereof, and within ten (10) days from the completion of such well, or, if a well is then being drilled on the leased premises, within ten (10) days from the completion of such well then being drilled on the leased premises, Lessee shall commence the drilling of the necessary offset well hereunder, unless such

location has already been drilled or condemned; it being understood and agreed that Lessee shall not be required to have more than four (4) offset drilling operations on the leased premises at any one time and that Lessee shall not be required to drill a total of more than seven (7) offset wells to the Benoist Sand in addition to the eight (8) wells required to be drilled, completed and operated pursuant to the provisions of paragraphs 4 and 5 of this Article II. Lessee shall not be required to drill a total of more than four (4) offset wells to the McCloskey horizon in addition to the five (5) wells required to be drilled, completed and operated pursuant to the provisions of paragraph 6 of this Article II. If such drilling operations are not so commenced and diligently continued, then all rights of Lessee [fol. 25] hereunder shall cease and terminate, and Lessee shall have no further rights in the leased premises; provided, however, that any such default by Lessee shall not affect Lessee's rights in and to any well or wells previously completed on the leased premises, but Lessee shall retain such well or wells subject to the other terms and conditions hereof, together with an area around ~~each such~~ producing well which measures not more than 50 feet perpendicular to the center line of the aforesaid main railroad track, and 150 feet parallel to the center line of said main railroad track, but not exceeding 75 feet on each side of the well, such area in no event extending across the center line of the main railroad track or beyond Lessor's property limits.

8. All operations by Lessee hereunder shall be according to the following terms and conditions:

(a) Wells, pipe lines, and all other structures and equipment shall be located by Lessee on the leased premises only at such places as shall be approved from time to time in advance by Lessor's Chief Engineer in writing.

(b) Lessee agrees at all times to conduct its operations hereunder in conformity with the requirements of Federal, State, County and Municipal authority, and to comply with all valid rules and regulations of the Illinois Commerce Commission.

(c) Lessee shall not complete any well on the leased premises without notifying Lessor's Chief Engineer at St. Louis, by telegraph at least twenty-four (24) hours before such completion, and Lessee agrees to carry out such com-

pletion only during such period as may be specifically designated by Lessor after receiving said telegraphic notice. Lessee shall drill and complete all wells on the leased premises with every possible precaution and in the most approved manner, so as to avoid all risk of explosion, fire or other catastrophe, and so as not to interfere with the safe and convenient operations of Lessor. After completion, all producing wells shall, where practicable, be enclosed in sheet-iron houses, and the same shall be kept securely locked.

(d) Lessee agrees to keep the leased premises at all times clean and safe from waste oil and gas, and to store all oil [fol. 26] produced hereunder a sufficient distance from the leased premises to insure safe operation of trains thereover, and to take all possible precautions against hazard of fire, explosion or other catastrophe.

(e) Lessee agrees not to shoot, treat or rework any well on the leased premises without notifying Lessor's Chief Engineer at St. Louis, Mo., by telegraph at least twenty-four (24) hours in advance, and to carry out such operations only during such period as Lessor may specifically designate after receiving said telegraphic notice. Lessee further agrees to use every possible precaution and the most approved methods in carrying out such operations, so as to avoid all risk of fire, explosion or other catastrophe, and so as not to interfere with the safe and convenient operations of Lessor.

(f) Lessee agrees that it will not interfere with the telegraph, telephone and signal lines, or other structures, upon the leased premises, or with the operation of said facilities. In case Lessor's Superintendent, in writing, after written application of Lessee, approves the movement or rearrangement of any of said facilities, to permit of Lessee's operations under this lease, the work shall be done or caused to be done by Lessor at Lessee's cost, and Lessee on rendition of bills shall reimburse and pay to Lessor the cost of said work including the Lessor's then customary charges and surcharges for labor and material and, also, for use of equipment employed on the work and excise taxes on labor and materials, and cost for Workmen's Compensation and Public Liability Insurance carried by Lessor on said work.

(g) Lessee hereby agrees that it will not interfere with the use and occupancy of the leased premises by Lessor or

anyone thereon by Lessor's authority, nor with the property thereof, and will promptly pay any damages resulting from its failure so to do.

(h) Any storage tank, flow tank, oil sump or separator shall be built or installed by Lessee only at such places on the leased premises as shall be approved from time to time by Lessor's Chief Engineer, in writing.

9. Lessee hereby releases and discharges Lessor, Lessor's tenants and invitees, from all liability because of any [fol. 27] loss of or damage to Lessee's property, or of others in its possession, delay to Lessee's operations, and injury to or death of Lessee's employes, and Lessee will indemnify and save Lessor harmless from and against all actual expenses and claims because of loss of or damage to property, including that of Lessor, or of others in Lessor's possession or on Lessor's property, and because of injury to or death of persons, including Lessor's employes and passengers on Lessor's trains, and Lessor's tenants and invitees and their employes, growing out of, arising from, or in any way incident or attributable to the operations of Lessee, whether such loss, damage, injury or death be caused or contributed to by negligence or otherwise, and will promptly repay any sum or sums which Lessor, Lessor's tenants and invitees, may pay or be compelled to pay, and discharge any judgment or judgments that may be rendered against Lessor, Lessor's tenants and invitees, including all costs and attorney's fees, because of any such claim or claims. No other provision of this contract shall be construed to waive or limit the liability of Lessee as defined in this paragraph.

10. Lessee further agrees at Lessee's own expense to carry insurance at all times in a company or companies approved by Lessor, protecting Lessor, Lessor's tenants and invitees, and Lessee against the liability involved in the next preceding paragraph, with limits of $50,000.00 for one person and $100,000.00 for one accident for personal injuries, and $50,000.00 for property damage, and to furnish Lessor true original counterparts of such policies and have Lessor's written approval of said policies at least forty-eight (48) hours before entering the said leased premises hereunder.

11. Lessee further agrees to at all times, at Lessee's own cost and expense, defend, fully indemnify and forever save

harmless the Lessor, Lessor's successors and assigns, from all claims, damages, action or causes of action arising or in any manner growing out of the operations of Lessee in the production or removal of oil or gas in, on or from the premises herein conveyed, save and except therefrom, however, such oil or gas as may accrue to the credit or Lessor as royalties hereunder.

[fol. 28] 12. Lessee further agrees that Lessee will not create, suffer or permit the creation of any lien, either contractual, constitutional, statutory, or of any other sort whatsoever, on the premises hereby leased, or on any part thereof, or on any tools, casing, pipe or other equipment of any sort whatsoever used or about to be used on the leased premises.

13. It is agreed that the operating rights, duties and responsibilities of Lessee hereunder shall not be assignable by Lessee either in whole or in part, except after obtaining written consent to such assignment from Lessor. Lessee may, however, assign any portion of the proceeds from the working interest hereunder, provided that Lessee shall retain operation of the leased premises and shall remain liable to Lessor for all of the operating duties, responsibilities and liabilities of this contract. The appointment of a Receiver or a Trustee in Bankruptcy, affecting either the leased premises or Lessee, shall be construed to be a violation of the covenant against assignment.

14. In consideration of the premises, Lessee covenants and agrees during the entire term hereof:

(a) To deliver to the credit of Lessor, free of cost, in the pipe line to which each well on this lease is connected, or in tank cars in which such oil is loaded for transportation, the equal twenty nine-sixty fourths (29/64) part of all oil produced, saved and marketed from the leased premises, provided Lessee can produce and sell from all producing wells on the leased premises an average of more than thirty (30) barrels per well per day; and twenty two-sixty fourths (22/64) of all oil produced and saved from the leased premises, if Lessee produces and sells from all producing wells an average of thirty (30) barrels or less per well per day; it being understood and agreed by and between the parties hereto that in arriving at the average per well per day basis for any period during the term of this lease that it will be

based upon a pipe line month (said pipe line month not to exceed thirty-one [31] days), that is to say, each month Lessee is able to produce and sell an average of more than thirty (30) barrels of oil per well per day, Lessor shall receive said twenty nine-sixty fourths (26/64) of the oil produced and sold from said premises and that any month dur-
[fol. 29] ing the life of said lease the Lessee is not able to produce and sell from said wells an average of more than thirty (30) barrels of oil per well per day, then for each month Lessor shall receive twenty two-sixty fourths (22/64) of the oil produced and sold from said premises during such month;

(b) To pay Lessor for gas produced from any well, including that used for the manufacture of casinghead gasoline, the equal twenty nine-sixty fourths (29/64) part of the gross proceeds realized from the sale thereof so long as Lessee has been able to produce and sell from said premises said average of more than thirty (30) barrels of oil per day per well during the month and the equal twenty two-sixty fourths (22/64) part of the gross proceeds realized from the sale of said gas and cashinghead gasoline during such months that the Lessee has not been able to produce and sell an average of thirty (30) barrels of oil per well per day; it being further understood and agreed by and between the parties hereto that any sale of gas or casinghead gasoline will be pursuant to the terms and conditions of an agreement with the purchaser of such gas having mutual approval of the parties hereto; and

(c) To store and market, free of expense to Lessor, all royalty oil produced hereunder in the same manner as it stores and markets its own oil, whenever Lessor does not elect to take the same in kind, obtaining therefor the posted price prevailing in this field from day to day for oil of like kind and character, or at such other and different price or prices as shall have been approved, from time to time, by Lessor in writing; such payments to be made to Lessor at Lessor's Office in St. Louis, Missouri, on or before the fifteenth (15th) day of the month succeeding such production.

15. The due-date of all money royalties due Lessor hereunder is hereby fixed as the fifteenth (15th) day of each month covering oil production of the preceding month, and the twentieth (20th) day of each month covering gas pro-

duction of the preceding month; and it is expressly agreed that all such royalties not so paid within ten (10) days after the fifteenth (15th) day or twentieth (20th) day, as the case may be, shall bear interest at the rate of six per cent [fol. 30] (6%) per annum from such due-date until paid, but this provision shall in no manner waive or extend the specific due-dates of such royalty payments.

16. Lessee shall have the free use of oil and gas for all operations hereunder on the leased premises, and the royalties herein provided for shall be computed after proportionately deducting any so used.

17. As further consideration for this lease, Lessee expressly agrees to pay before delinquency, and save Lessor harmless from, sixty per cent (60%) of all increases in all taxes, and all intangible taxes, over and above those fixed for the year 1938, and also, sixty per cent (60%) of any and all taxes, other than income taxes during the life of this lease, whether called severance, gross production, pipe line or by any other name, caused or resulting from the development or production of oil or gas hereunder. Lessee agrees to bear and pay, and save Lessor harmless from, all taxes levied or assessed on Lessee's property contained, from time to time, on the leased premises.

18. As further consideration for this lease the Lessor and Lessee mutually covenant and agree that, subject to the provisions of Article III of this agreement, within sixty (60) days from the effective date of this lease, as hereinabove reserved, a readjustment and accounting shall be made between the Lessor and Lessee, to the end that the provisions of this Article II shall be applied retroactively from said effective date and due credit and adjustment shall be made of any payments made under Article I of this agreement.

19. It is agreed that Lessee shall furnish, install, operate and maintain, at Lessee's own expense, adequate apparatus for measuring all gas produced hereunder, said apparatus to be equipped with orifice meters or such other standard type of meter as may be mutually agreed upon; and all such equipment so installed on the leased premises, together with any buildings erected in connection therewith, shall be and remain Lessee's property, subject to the other provisions hereof. Whether such equipment is installed

on the leased premises or elsewhere, Lessor shall have free access thereto at all reasonable times. but the calibrating [fol. 31] and adjusting thereof and the changing of charts shall be done only by Lessee. All charts shall be available for examination by Lessor at any time.

20. All dry gas produced and sold hereunder shall be measured and computed on the basis of ten (10) ounces above an assumed atmospheric pressure of fourteen and four tenths (14.4) pounds per square inch absolute, and at a base temperature of sixty (60) degrees Fahrenheit; provided, that all coefficients used for such computations shall be subject to specific approval by Lessor.

21. Lessee shall test Lessee's metering equipment quarterly, and at the request of either party upon ten (10) days' notice to the other party. Lessee shall notify Lessor in writing ten (10) days in advance of Lessee's regular quarterly tests, so that Lessor may have a representative present to witness said test and any adjustments of the said metering equipment.

22. If upon any test any metering equipment is found to be out of operation or inaccurate by two per cent (2%) or more, registrations thereof shall be corrected to accuracy for any period which is known and agreed upon; but in case such period is not known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration, but not exceeding forty-five (45) days.

23. The gasoline content of all gas produced hereunder and used for the manufacture of casinghead gasoline shall be determined by tests made in accordance with the specifications and procedure of the Natural Gasoline Association of America, and such tests shall be computed on the basis of four (4) ounces above an assumed atmospheric pressure of fourteen and four tenths (14.4) pounds per square inch absolute, and at a base temperature of sixty (60) degrees Fahrenheit; provided that all coefficients used for such computations shall be subject to specific approval by Lessor.

24. Tests for gasoline content, air content and specific gravity shall be made quarterly, and at the request of either party upon ten (10) days' notice to the other party. Lessee shall notify Lessor in writing ten (10) days in ad-

[fol. 32] vance of Lessee's regular quarterly tests, so that Lessor may have a representative present to witness said tests.

25. Lessee shall have the right at any time within three months after the expiration of this lease by completed performance to remove all property and fixtures placed by Lessee on the leased premises, including the right to draw and remove casing. When requested by Lessor, Lessee shall bury all pipe lines below ordinary plow depth.

26. Lessor shall be furnished with the logs of all wells drilled by Lessee hereunder. Actual production from each quarter section in which any part of the leased premises is located shall be kept and reported separately. Lessor's authorized representatives shall at all reasonable times during office hours have access to Lessee's records and books of account for the purpose of inspection and of making copies thereof or excerpts therefrom, relating to the production and sale of oil and gas under the provisions of this lease.

27. Should Lessee fail in any manner to perform any of Lessee's obligations herein provided for, except as to the drilling of a well or wells in accordance with paragraph 5 or paragraph 6 or paragraph 7 of this lease, then at the option of Lessor, after five (5) days written notice mailed to Lessee at Milam Building, San Antonio, Texas, and Lessee's failure to correct the matter complained about, Lessor may declare this contract of lease terminated in its entirety.

Should Lessee fail only to drill a well or wells as provided for in paragraph 5, paragraph 6 and paragraph 7 of this lease, then this grant shall automatically terminate, without any action whatsoever by Lessor, as to all of the said premises not so drilled.

It is expressly understood and agreed that partial or total cancellation or termination of this grant under this paragraph 27 shall not be in lieu of damage suffered by Lessor, but that all of Lessor's rights of damages against Lessee for any breach of this contract shall be preserved.

Article III

In the event that Principal's title to oil rights on the premises in question be upheld in part and rejected in part

[fol. 33] by final decree of the United States District Court for the Eastern Division, Eastern Judicial District of Missouri in proceedings more fully described in Article I hereof, and be affirmed on appeal, if appeal be taken thereupon, if either party to this contract is of the opinion that a fair and equitable disposition of the rights of the contracting parties with respect to the oil rights that have been sustained requires some modified application of the provisions of Article II, then the parties hereto shall attempt to agree upon such modified terms and conditions so as to meet such exigencies and equities of the situation, and failing to agree, shall present their differences to the administrative Judge in the aforesaid proceedings and shall abide by his determination as to what is fair and equitable, with due regard for the intents and purposes of the agreement of lease expressed in Article II of this agreement, and with due regard for changes therein made necessary by any defects in title. Any such agreement or ruling of the Court with respect thereto shall, in so far as possible, be retroactively applicable from the date of this agreement, and accounting shall be adjusted pursuant to such agreement or ruling of the Court.

In Witness Whereof, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, has executed this agreement pursuant to and in accordance with the provisions of Order No. —, made and entered on the — day of —, 1938, by the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in the aforesaid Proceedings, and Blackstock Oil Company has caused its corporate name to be signed hereunto by its President and its corporate seal to be hereto affixed by its Secretary, by authority of its Board of Directors, the day and year first above written.

—— ——, Trustee, Missouri-Illinois Railroad Company, Debtor.

[fol. 34] Witnesses: —— ——.

Blackstock Oil Company, By —— ——, President.

By —— ——, Secretary. (Affix Seal.)

Attest: —— ——.

STATE OF MISSOURI,
City of St. Louis, ss:

On this — day of ——, 1938, before me, the undersigned Notary Public, duly commissioned, qualified and acting, within and for the said City and State, appeared in person the within named Guy A. Thompson, personally known to me to be the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, Debtor, by appointment of the Judge of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and personally known to me to be the same person whose name is subscribed to the foregoing instrument, and acknowledged that as such Trustee he signed and delivered the said instrument as his free and voluntary act, for the consideration, uses and purposes therein mentioned and set forth.

In Testimony Whereof, I have hereunto set my hand and official seal the day and year first above written.

My commission will expire —— —, 19—.

——, Notary Public.

STATE OF TEXAS,
County of Bexar, ss:

I, ——, a Notary Public in and for said County in the State aforesaid, do hereby certify that H. L. Blackstock and ——, personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing, appeared before me, this day, in person and declared themselves to be the President and —— Secretary, respectively, of Blackstock Oil Company, a corporation, and acknowledged that they signed, sealed [fol. 35] and delivered the said instrument, as such President and —— Secretary, as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

Given under my hand and notarial seal at ——, in said County, this — day of ——, 1938. My commission will expire —— —, 19—. ——, Notary Public.

[Blue print attached to original Contract not here printed.]

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RECORD ENTRY SHOWING FILING OF AMENDMENT TO PETITION OF TRUSTEE AND SEPARATE ANSWERS OF MAGNOLIA PETROLEUM CO., AND OHIO OIL CO., & HEARING UPON SAID PETITION AND SEPARATE ANSWERS—November 9, 1938

Amendment of Trustee of Missouri-Illinois Rd. Co., debtor, to his petition for determination of title, and for advice and directions respecting certain proposed oil operations on right of way of said debtor near Salem, Ill., filed by leave.

Separate answers of Magnolia Petroleum Co., Kingwood Oil Co., and Ohio Oil Co., to Trustee's aforesaid petition filed by leave.

Said Trustee's application as contained in his aforesaid petition, for interlocutory order authorizing Trustee to forthwith execute proposed contract with Blackstock Oil Co., to carry out the terms and conditions of said contract, to sell, etc., any oil or gas removed from said right of way property under said contract, and said Trustee to keep separate accounts of same and after payment of expenses, etc., to hold remainder of proceeds from sale of such gas or oil from said premises, pending determination of title thereto, heard, argued and submitted on briefs, Trustee's brief being filed forthwith and respondents granted two [fol. 36] days within which to file reply briefs. Trustee's draft of proposed interlocutory order submitted.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION OF TRUSTEE FOR DETERMINATION OF TITLE, AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY NEAR SALEM, ILLINOIS—Filed November 9, 1938

[Amendment No. 1167]

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, by counsel, and respectfully

requests authority to amend subdivision (o) of Article I of "Exhibit A" to Trustee's petition (Rec. pp. 8961-8962) to read as follows:

(o) For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractor's performance of Contractor's undertakings as in this Article I expressed and set forth, during each calendar month of term hereof, Principal shall pay to Contractor and Contractor accept, on or before, the fifteenth (15th) day of the next succeeding calendar month, payments to be determined as follows, to-wit:

(1) Cost of Each Well Completed During Such Calendar Month.

a. Price per foot depth of well (including therein the following items; service of geologist, Schlumberger survey, steel housing for well, changes in railroad facilities, casing fittings consisting of master valve, floatshoe, Hinder liter head and surface rights on adjoining property) $3.25

[fol. 37] b. Well connections and flow lines in place, lump sum per well 350.00

c. Necessary grading of temporary roads and cleaning up around well site, lump sum per well 200.00

d. Trucking expense incident to drilling and completing the well, lump sum per well 200.00

e. Actual invoice cost of:
Surface pipe,
Casing pipe,
Cementing surface pipe and casing,
Rental of cable tools at $5.00 per hour based on actual hours in use,
Tubing,
Tanks and separator,
Public liability.

f. 5 per cent for accounting and supervision.

(2) Operating Cost of Producing Oil after Drilling is Completed.

a. $25.00 per month per well for first five wells, and $15.00 per month per well for additional producing wells to cover cost of accounting and bookkeeping at Contractor's main office and in the field.

b. Invoice cost of rods, working barrel, pump unit with engine, including necessary connections and fittings at such time as wells cease to flow, and all other materials and supplies for production and saving of oil.

c. All of the labor cost for production and saving of oil.

d. 5% of items b and c for supervision.

(3) Gathering and Marketing Cost.

a. Actual cost, plus 5 per cent for the installation, maintenance and operation of facilities required for gathering the oil from the well tanks and loading the oil in tank cars. Should oil be delivered to pipe line, no facilities will be required.

[fol. 38] b. Actual transportation expense from loading track to destination, subject to the provisions of sub-paragraph (k) of Paragraph 1 of this Article I.

c. Actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month, with 5 per cent thereon for supervision.

d. All State or Federal taxes on production or marketing of oil.

(4) Interest at the rate of six per cent (6%) per annum on the amount of any payment due Contractor hereunder and not paid to Contractor within sixty (60) days after Contractor's submission of bill and necessary supporting invoices.

And Petitioner prays that that portion of Trustee's petition appearing on pages 8943 and 8944 of the printed record in these proceedings be amended to correspond with the foregoing.

Respectfully submitted, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Co., Debtor, by Thos. T. Railey, Attorney for Trustee.

The foregoing amendments approved this 9th day of November, 1938.

Geo. H. Moore, United States District Judge.

[File endorsement omitted.]

In United States District Court

Answer of Magnolia Petroleum Company to Petition for Determination of Title and for Advice and Directions Respecting Certain Proposed Oil Operations on Right of Way of Missouri Pacific Railroad Company, Near Salem, Illinois—Filed November 9, 1938

[Answer No. 1167-A]

Now comes Magnolia Petroleum Company, by Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

[fol. 39] (1). This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and Acting Trustee of said subsidiary debtor.

(2). This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights-of-way of the various debtor Companies, but this Defendant, further answering, states the facts to be that if such an Order was entered that the Court was without jurisdiction to enter any such order with reference to the rights-of-way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right-of-way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right-of-way and did not own or have title to the minerals thereunder.

(3). This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right-of-way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, [fol. 40] Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4). This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owner William B. Young covering the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company where the said right-of-way crosses the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said William B. Young has the fee simple ownership of the said Oil and Gas and other Minerals under the right-of-way of the said Railroad Company through the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois.

(5). This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in the Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right-of-way of

the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals under its said right-of-way either by conveyance or by adverse possession.

(6). This Defendant, further answering, admits that the following conveyances of right-of-way appear of Record in [fol. 41] the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the oil, gas, or other minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed, dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois:

A strip of ground for right-of-way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located;

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261 in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois, to-wit:

A strip of land for right-of-way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,

but that the said Conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the land-owners, William Young and Emma Young, his wife, and that the said Oil and Gas Lease of the Defendant, the Magnolia Petroleum Company, covers the whole of the Southwest Quarter of the

Northeast Quarter of said Section Twenty (20) and covers and includes the Oil, Gas and other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

[fol. 42] Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company, the following described right-of-way in Marion County, Illinois, to-wit:

A strip of ground sixty-six (66) feet wide for right-of-way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian;

but that the said conveyance did not pass title to the Oil and Gas and other Minerals and that the Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right-of-way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577 in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right-of-way over and across the following described real estate in Marion County, Illinois, to-wit:

A strip of ground for right-of-way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of

land over and across said above described tracts of land where the said Railroad is now located,

and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but [fol. 43] that the title thereto remained in the landowner, and that the Ohio Oil Company holds ~~an~~ Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed, could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right-of-way.

(7). This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right-of-way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas, and other Minerals under the said premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas, or Other Minerals, in, or under the said premises; and

(8). This Defendant, further answering states that the said Trustee and the said Missouri-Illinois Railroad is not now lawfully vested with title to all of the Oil and Mineral

Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

[fol. 44] (9). This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying the said right-of-way it will be drawn into the wells on adjoining lands and that the value thereof will forever be lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the fact to be that the Stockholders, Creditors of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right-of-way of the said Company; and

(10). This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act to determine all questions respecting title thereto, and denies that, pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right-of-way prior to the adjudication of adverse claims respecting the title in this said proceeding; and

(11). This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from the Trustee, has any right, power, or authority to drill upon the said right-of-way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right-of-way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment

of the expenses thereof out of the oil recovered, when the [fol. 45] effect of such an order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises at the cost of this Defendant, and that there is no Law, Statute, or authority under the law authorizing such a procedure which would amount to a confiscation of the property of this Defendant without giving it an opportunity to be heard; and

(12). This Defendant; further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right-of-way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas, and Mineral Rights in and under aforesaid right-of-way in and across the aforesaid Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form of Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title, should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in the said premises; and

(13). This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that [fol. 46] Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A",

and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said oil and/or gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, as may hereafter be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas, in, or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for oil or gas on the said right-of-way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right-of-way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14). This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas, and other Minerals under the said premises, and that, under such an allegation and verification that this Court has no right, power or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15). This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right-of-way described in said Petition, is merely a surface easement, and that the said Petitioner and the said Railroad Company have no right, title or interest in, or to the Oil or Gas or other Minerals under the said Rail- [fol. 47] road right-of-way, and have no right to drill for Oil or Gas upon the said Railroad right-of-way.

Magnolia Petroleum Company, Defendant, by Craig and Craig, by Craig Van Meter, Attorneys for Said Defendant. Craig & Craig, Attorneys for Defendant, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF OHIO OIL COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY, NEAR SALEM, ILLINOIS—Filed November 9, 1938

[Answer No. 1167-C]

Now comes Ohio Oil Company by Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1). This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor;

(2). This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into Gas and Oil Leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be, that if such an Order [fol. 48] was entered that the Court was without jurisdiction to enter any such Order with reference to the rights of way in Section Twenty (20), Township (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its

right of way and did not own or have title to the minerals thereunder.

(3). This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4). This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young, covering the southeast quarter of the northwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right-of-way of the said Railroad Company where the said right of way crosses the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) [fol. 49] East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southeast quarter of the northwest quarter of Section twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois; and this Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Lula Young, a widow, and Roger C. Young, covering the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County,

Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and other Minerals under the right of way of the said Railroad Company where the said right of way crosses the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Lula Young, a widow, and Roger C. Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois.

(5). This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in the Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois [fol. 50] Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals, under its said right of way either by conveyance or by adverse possession.

(6). This Defendant, further answering, admits that the following conveyances of right of way appear of Record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the Oil, Gas or other Minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad

Company, the following described right of way in Marion County, Illinois:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located;"

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois:

"A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,"

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the Magnolia [fol. 51] Petroleum Company is the owner of an Oil and Gas Lease which covers the whole of the southwest quarter of the northeast quarter of said Section Twenty (20) which covers and includes the Oil, Gas and other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois, to-wit:

"A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter

of Section twenty (20), Town two (2) North, Range Two (2) East of the Third Principal Meridian;"

but that the said conveyance did not pass title to the Oil and Gas and other Minerals and that this Defendant, the Ohio Oil Company, is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and other Minerals under the right of way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577, in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter, and the southeast [fol. 52] quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located," and that the said Deed did not convey the Oil, Gas and other Minerals under the said strip of land therein described, but that the title thereto remained in the land owner, and that this Defendant, the Ohio Oil Company holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-Half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described, to said railroad company, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that

the said Caroline Rusler, by her Deed could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7). This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas and other Minerals under the said premises:

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas or other Minerals, in, or under the said premises; and

[fol. 53] (8). This Defendant, further answering, states that the said Trustee, and the said Missouri-Illinois Railroad, is not now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9). This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right of way, and that, unless prompt action be taken to remove the oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will be forever lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to be that the Stockholders, Creditors, of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10). This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act, to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and

(11). This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from said Trustee, has any right, title, power, or authority to drill upon the said right of way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Com- [fol. 54] pany is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the proceeds from oil recovered, when the effect of such an Order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises when there is no Law, Statute, or authority under the Law, authorizing such a procedure, which would amount to a wrongful confiscation of the oil and property of this Defendant; and

(12). This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas

and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town Two (2) Nor. , Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form as Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in Petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said Contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises, free and clear of all liens or claims of others; predicated upon alleged adverse ownership of any rights in the said premises; and says [fol. 55] that such an Order, if made, would be void; and this Defendant, further answering, denies the right of the Trustee and the authority of the Court to dissipate the assets of the Railroad Company by contracting for the expenditure of large sums of money in a line of business foreign to that for which it was incorporated, and for which it might never be reimbursed, to exploit right of way lands for the production of Oil and Gas to which it has no title, thereby causing great damage to the rightful owners of such Oil and Gas, for which it would be held to account.

(13.) This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A", and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds

for the account of whom concerned, hereafter to be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas, in, or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for Oil or Gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14). This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and other Minerals under the said premises, and that, under such an allegation and verification, this [fol. 56] Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15). This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right of way described in said Petition, is merely a surface easement and that the said Petitioner and the said Railroad Company have no right, title, or interest in, or to the Oil or Gas, or Other Minerals under the said Railroad right of way, and have no right to drill for oil or gas upon the said Railroad right of way.

Ohio Oil Company, Defendant, by Craig & Craig, Craig Van Meter, Attorneys for Said Defendant. Craig & Craig, Attorneys for Defendant, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois.

[File endorsement omitted.]

In United States District Court

Order, November 14, 1938, Authorizing Guy A. Thompson, Trustee, to Enter into Contract for Drilling of Wells and Marketing of Oil and Gas, etc.; Decree—Filed Nov. 14, 1938

[Interlocutory Order No. 1167]

In the Matter of Missouri Pacific Railroad Company, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

This matter coming on for further hearing this 9th day of November, 1938, on petition of Guy A. Thompson, Trus- [fol. 57] tee, Missouri-Illinois Railroad Co., Debtor, for an order approving contract between Trustee and Blackstock Oil Company, substantially in form of "Exhibit A" filed with Trustee's petition; for an order determining and protecting Trustee's title to the minerals, including oil and gas, underlying or removed from the land on which right of way of Missouri-Illinois Railroad is situated, ranging from 30 to 33 feet on each side of the center line of the main-line track and extending diagonally northeast to southwest across the Northeast Quarter, and the Southeast Quarter of the Northwest Quarter, and the Northwest Quarter of the Southwest Quarter, all in Section 20, Township 2 North, Range 2 East of the third principal meridian in Salem Township, Marion County, Illinois; for an order authorizing Blackstock Oil Company, after execution of said contract and pursuant to Article I thereof, to immediately proceed with the drilling of wells and the removal and marketing of the oil and gas from said lands, the proceeds thereof, after deducting expenses for drilling, conservation, and marketing, to be held by Trustee for the account of those concerned as their rights, title, and interest may in these proceedings be hereafter determined by this Court; and for an order vesting Trustee with title and enjoining interference therewith:

And it appearing to the Court that The Ohio Oil Company, with offices at Findlay, Ohio, Kingwood Oil Company, with offices at Mattoon, Illinois, and Magnolia Oil Company,

with offices in Magnolia Building, Dallas, Texas, are the only adverse claimants who have affirmatively asserted claim to title to any or all of the aforesaid property or to the oil or gas removed therefrom, and it appearing to the satisfaction of the Court that each of said oil companies has been given ample notice of this hearing and has been sent by registered mail copy of Trustee's petition pursuant to which this order is entered, with notice to appear and be heard at the time of the presentation thereof:

And said The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company having each entered their appearance by counsel and participated in these proceedings; and the Court having heard such evidence as the [fol. 58] parties care to offer respecting the necessity for an interlocutory order permitting the drilling upon said property and the removal, conservation, and marketing of oil and gas therefrom pending determination of any adverse claim to title; and the Court being otherwise fully advised in the premises, finds:

(a) That said Guy A. Thompson, as Trustee, Missouri-Illinois Railroad Co., Debtor, acting under the jurisdiction of this Court, is in actual possession of the property hereinbefore described, under assertion of claim to fee-simple title thereto, and that this Court has accordingly jurisdiction over the subject matter and is vested with authority to determine the interest of adverse claimants in and to the mineral, oil and gas rights in and underlying said property and to protect the interest of the Trustee therein;

(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court:

(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so received;

(d) That in addition to The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company, each of which has, through appearance of counsel and participation in these proceedings, entered their respective appearances, there may be other claimants unknown who should be brought into these proceedings by publication:

Now, It Is Accordingly Ordered:

(1) That said The Ohio Oil Company, Kingwood Oil Company, and Magnolia Oil Company plead to Trustee's petition within twenty days from this date, setting forth such claims to adverse title to the mineral, oil and gas rights in or under the property in question as they may care to assert.

(2) That notice in substantially the following form and preceded by the caption of these proceedings be printed by the clerk of this Court in at least two consecutive issues of [fol. 59] a newspaper of general circulation in the County of Marion, Illinois, to-wit:

"Whereas, Missouri-Illinois Railroad Company has heretofore filed petition as subsidiary of Missouri Pacific Railroad Company for reorganization, pursuant to the provisions of Section 77 of the Bankruptcy Act, which proceedings more fully described in caption are pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri; and

"Whereas, this Court, through its Trustee, now has possession and jurisdiction over certain lands on which right of way of the Missouri-Illinois Railroad Company is situated, extending diagonally northeast to southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section 20, Township 2 North, Range 2 East, in Salem Township, Marion County, Illinois; and

"Whereas, Trustee has filed in said proceedings petition seeking an adjudication of Trustee's title to the right of way in the aforesaid section and to the mineral, oil and gas rights underlying said right of way:

"Now, It Is Accordingly Hereby Ordered:

"That any adverse claimant asserting title to any part of the land upon which said right of way is situated or to the mineral, oil or gas rights underlying said right of way, file within 20 days from the date of this order with the clerk of this Court answer or other return to the said petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, showing cause, if any there be, why this Court should not find and decree that all oil, gas and mineral rights in and under the aforesaid right of way, in and across said Section 20, are now vested in petitioner as

Trustee, Missouri-Illinois Railroad Company, Debtor; and pending further order of this Court to the contrary, all such claimants are hereby enjoined from otherwise asserting any further title in and to the land over and upon which said right of way is located, or to the mineral, oil or gas deposits in and under said right of way or extracted therefrom.

[fol. 60] "For further details see decree on file with the clerk of this Court.

"Dated November 14, 1938.

"George H. Moore, United States District Judge."

(3) That Trustee be and he hereby is authorized to enter into contract with Blackstock Oil Company substantially in the form of Exhibit A filed with Trustee's petition, as amended on motion of Attorney for Trustee, and pursuant to the terms of Article I thereof to arrange for the immediate drilling of wells and the removal, conservation, and marketing of the oil and gas taken from said premises, provided not more than five wells may be drilled on said right of way pending determination of title without further approval of this Court.

(4) That the proceeds from the sale of such oil and gas shall be paid over to Trustee, and Trustee, after deducting therefrom the expenses under Article I of said contract and other reasonably necessary expenses in drilling, removing, conserving, and marketing said oil and gas, shall hold the remainder of said proceeds for the account of adverse claimants and parties in interest as their respective rights may hereafter be determined by order of this Court in these proceedings.

(5) That Trustee, until the Court may otherwise order and direct, be and he hereby is vested with title to said oil and gas underlying or removed from said premises, and with the right to convey said title free and clear of all claims predicated upon alleged adverse ownership of any part of the land upon which Trustee's right of way is situated or the mineral, oil or gas rights therein, and any one purchasing said oil or gas from or through Trustee shall acquire good and merchantable title thereto.

(6) That, pending further order of this Court to the contrary, all parties, regardless of whether their appearance

shall have been entered in these proceedings, are enjoined and restrained from interfering with the drilling upon said premises by Blackstock Oil Company pursuant to aforesaid [fol. 61] contract with Trustee, or from asserting or attempting to enforce, other than in these proceedings, any adverse claim to said premises or to the mineral, oil or gas in or underlying said premises or extracted therefrom, or from attacking or interfering with the title thereto of any purchaser holding under or through Trustee.

(7) That Trustee be and he hereby is directed to keep separate account of the expense incurred in drilling each well and to keep separate account of all oil and gas removed from each separate tract to which adverse claim is asserted in these proceedings, and of the expenses and profits in connection therewith. Pending further order of this Court, all of the funds coming into possession of Trustee from the sale of the oil in question less such expenses as are herein authorized to be borne out of said funds, shall be held in separate bank account as a trust fund and shall not be commingled with the other assets of the Trustee of Missouri-Illinois Railroad Company, and in the event and to the extent that Trustee's title to said funds may be upheld, this Court reserves jurisdiction to thereupon determine the alleged rights of the Trustee under the First Mortgage of the Missouri-Illinois Railroad Company to receive and take possession of said funds as security under said mortgage, and nothing herein contained shall prejudice any claim of said mortgage trustees to a lien upon said funds or to a lien upon the rights of Missouri-Illinois Railroad Company or of the Trustee of said Railroad Company under the aforesaid contract.

(8) That this Court reserves jurisdiction to amend or amplify this interlocutory order as may hereafter be deemed proper, but without prejudice to the title of any one who theretofore has purchased or acquired oil or gas from or through Trustee, in reliance upon this interlocutory order; and the Court further reserves jurisdiction to hear on their merits any adverse claims to title, and reserves the right to direct the cessation of any drilling by Trustee or Contractor if it be determined that Trustee has no title to the mineral, oil and gas rights underlying the portion of the

right of way in question, and to enter such further or dif-
[fol. 62] ferent order as to the Court may seem proper.

Geo. H. Moore, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF MAGNOLIA PETROLEUM COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY NEAR SALEM, ILLINOIS—Filed November 28, 1938

[Answer No. 1167-D]

Now comes Magnolia Petroleum Company, by Cobbs, Logan, Roos & Armstrong, and Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1)

This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these proceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor.

(2)

This Defendant, further answering, neither admits nor denies that by Orders heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be that if such an Order was entered that the Court was without jurisdiction

to enter any such order with reference to the rights of way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion [fol. 63] County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, owners of part interests in the oil and gas under said right of way, and this Defendant were not made parties to these proceedings, nor served with summons prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right of way and did not own or have title to the minerals thereunder.

(3)

This Defendant, further answering, denies that the Trustee has the right, or had the right to solicit bids for lease of All Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4)

This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owner, William B. Young, covering the southwest quarter of the northeast quarter of Section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right to and fee simple ownership of the Oil, Gas and other Minerals under the right of way of the said Railroad Company where the said right of way crosses the southwest quarter of the northeast quarter of section twenty (20), township two (2)

north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states [fol. 64] that the said William B. Young has the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southwest quarter of the northeast quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that the said William B. Young has not been properly served with summons in this proceedings and is not before this Court.

(5)

This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinafter described, originally vested in The Centralia & Chester Railroad Company, a predecessor railroad company heretofore owning and operating the line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee, and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas or other Minerals under its said right of way either by conveyance or by adverse possession.

(6)

This Defendant, further answering, admits that the following conveyances of right of way appear of Record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the oil, gas, or other minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed, dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester

Railroad Company, the following described right of way in Marion County, Illinois:

[fol. 65] A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located:

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($15)0) conveyed to the The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois, to-wit:

A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the Southwest Quarter of the Northeast Quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian,

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the said Oil and Gas Lease of the Defendant, the Magnolia Petroleum Company, covers the whole of the Southwest Quarter of the Northeast Quarter of said Section Twenty (20) and covers and includes the Oil, Gas and Other Minerals under the strip of land hereinabove last described, and that the Railroad Company has no right, title, or interest, to the said Oil and Gas and Other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds of Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to the The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois, to-wit:

A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east [fol. 66] one-half of the northwest quarter of the southwest

quarter of Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian;

but that the said conveyances did not pass title to the Oil and Gas and Other Minerals and that the Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and Other Minerals under the said right of way of the said Railroad Company hereinabove last described, and that the said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577 in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

A strip of ground for right of way for said Company sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter and the southeast quarter of the northwest quarter, all of said lands in Section Twenty (20), Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located,

and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but that the title thereto remained in the landowner, and that the Ohio Oil Company holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One-half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Leases, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said [fol. 67] Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described to said Railroad Company that the said Caroline Rusler was the owner of an undivided

one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed, could not convey the title even for an easement as to the other one-half (½) interest in the said real estate; as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7)

This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual; visible and exclusive possession of the Oil, Gas and Other Minerals under the said premises, and have never been in the actual, visible, exclusive and open possession of the said Oil, Gas, and other Minerals under the same premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas, or Other Minerals, in, or under the said premises; and

(8)

This Defendant, further answering, states that the said Trustee and the said Missouri-Illinois Railroad is not now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9)

This Defendant, further answering, denies that numerous oil wells have been drilled in close proximity to Trustee's right of way, and that unless prompt action be taken to re- [fol. 68] move the oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will forever be lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to

be that the Stockholders, Creditors of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10)

This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined; and denies that the said Court has authority to direct that the expenses thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and this Defendant denies that this Court has jurisdiction in this proceedings to determine title to the Oil, Gas, and Other Minerals under said right of way, and denies that the said Trustee is or ever has been in possession of the Oil, Gas, or Other Mnnerals under said right of way; and

(11)

This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from the Trustee, has any right, power, or authority to drill upon the said right of way for oil or gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would [fol. 69] be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the oil recovered, when the effect of such an order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor

to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expense upon the said premises at the cost of this Defendant, and that there is no Law, Statute, or authority under the law authorizing such a procedure which would amount to a confiscation of the property of this Defendant without giving it an opportunity to be heard; and

(12)

This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil, or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas, and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form of Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to otherwise carry out the terms and conditions of said contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises free and clear of all liens or claims of others predicated upon alleged adverse ownership of any rights in the said premises; and

[fol. 70] (13)

This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that Trustee, after paying the expenses provided for in Article I of the Contract herewith filed as Exhibit "A", and such other expenses as may be reasonably necessary in removing, con-

serving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, as may hereafter be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas in or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for oil or gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for Railroad Purposes over the said premises, and had no right to acquire the fee simple title to the Oil, Gas, and Other Minerals thereunder; and

(14)

This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verified said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and Other Minerals under the said premises, and that, under such an allegation and verification, this Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15)

This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said [fol. 71] Trustee and said Railroad Company may have in the railroad right of way described in said Petition, is merely a surface easement, and that the said Petitioner and the said Railroad Company have no right, title or interest in, or to the Oil or Gas or other Minerals under the said Railroad right of way, and have no right to drill for Oil or Gas upon the said Railroad right of way; and further, no summons have been issued for the landowners and owners of mineral interests under said right of way and that, therefore, said land owners and owners of said mineral interests are not

properly before the Court, and that this Court, in addition to all the other reasons heretofore urged has no jurisdiction to determine the question of title as to these premises for want of necessary parties before the Court.

Magnolia Petroleum Company, Defendant, by Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for said Defendant. Cobbs, Logan, Roos & Armstrong, Tenth Floor, Mississippi Valley Trust Building, 506 Olive Street, St. Louis, Missouri, and Craig & Craig, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois, Attorneys for Defendant.

Copy of above answer received this 28 day of November, 1938.

Russell J. Dearmont, Counsel for Trustee, Per N. J. Stevens.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES DISTRICT COURT

ANSWER OF THE OHIO OIL COMPANY TO PETITION FOR DETERMINATION OF TITLE AND FOR ADVICE AND DIRECTIONS RESPECTING CERTAIN PROPOSED OIL OPERATIONS ON RIGHT OF WAY OF MISSOURI PACIFIC RAILROAD COMPANY NEAR SALEM, ILLINOIS—Filed November 28, 1938

[Answer No. 1167-E]

Now comes The Ohio Oil Company, by Cobbs, Logan, Roos & Armstrong and Craig & Craig, its Attorneys, and as answer to the Petition of the Trustee in this cause, represents to the Court as follows:

(1)

This Defendant denies that in these proceedings, on June 30th, 1933, the Missouri-Illinois Railroad Company, a railroad corporation duly organized and existing under the Laws of the State of Missouri, and doing business in the State of Illinois, became a subsidiary debtor in these pro-

ceedings, and denies that the said Guy A. Thompson, Trustee, is now the duly appointed, qualified and acting Trustee of said subsidiary debtor.

(2)

This Defendant, further answering, neither admits nor denies that by Order heretofore entered in these proceedings, being Order No. 122, Record Page 789, and Order No. 407, Record Page 3157, said Trustee had been granted blanket authority to enter into Gas and Oil Leases and to contract for the drilling of oil wells on the rights of way of the various debtor Companies, but this Defendant, further answering, states the facts to be, that if such Order was entered that the Court was without jurisdiction to enter any such Order with reference to the rights of way in Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, for the reason that parties who were necessary and interested in the said proceedings, viz., the landowner, who held the fee simple title to the said premises covered by the right of way, owners of part interest in the oil and gas under said right of way, and this Defendant were not made parties to these proceedings, nor served prior to the time of entry of any such Order granting any such blanket authority, and that, therefore, any alleged blanket Order was null [fol. 73] and void and of no force and effect for the reason that the said Missouri-Illinois Railroad Company only held an easement over said lands as to its right of way and did not own or have title to the minerals thereunder.

(3)

This Defendant, further answering, denies that the Trustee has the right, or had the right, to solicit bids for lease of Oil Rights upon that part of the right of way of the Missouri-Illinois Railroad which ranges from sixty (60) to sixty-six (66) feet in width and extends diagonally Northeast to Southwest across the Northeast Quarter and the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, in the vicinity of the City of Salem, Illinois, herein referred to as the land or premises.

(4)

This Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young, covering the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right to and fee simple ownership of the Oil, Gas and Other Minerals under the right of way of the said Railroad Company where the said right of way crosses the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant further states that the said Martha J. Young, a widow, Mabel C. Young, spinster, Benjamin F. Young, Rueben Young and Jesse R. Young have the fee simple ownership of the said Oil and Gas and other Minerals under the right of way of the said Railroad Company through the southeast quarter of the northwest quarter of section twenty (20), township two (2) north, range two (2) East of the Third Principal Meridian, Marion County, Illi-[fol. 74] nois; and this Defendant, further answering, states the facts to be that it holds an Oil and Gas Lease from the fee simple owners, Lula Young, a widow, and Roger C. Young, covering the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and that its rights under said Oil and Gas Lease give it the right and fee simple ownership of the Oil, Gas and Other Minerals under the right of way of the said Railroad Company where the said right of way crosses the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian, Marion County, Illinois, and this Defendant, further answering, states that the said Lula Young, a widow, and Roger C. Young have the fee simple ownership of the said Oil and Gas and Other Minerals under the right of way of the said Railroad Company through the northwest quarter of the southwest quarter of Section Twenty (20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian,

Marion County, Illinois, and that said Martha J. Young, Mabel C. Young, Benjamin F. Young, Rueben Young, Jesse R. Young, Lula Young and Roger C. Young, have not been properly served with summons in this proceedings and are not before this Court.

(5)

This Defendant, further answering, denies that the Missouri-Illinois Railroad Company by conveyances and decrees of record had at the time it became subsidiary debtor in these proceedings as aforesaid, and that the Trustee has now succeeded to all of the title hereinabove described, originally vested in The Centralia and Chester Railroad Company, a predecessor railroad company heretofore owning and operating the Line of Railroad in Marion County, Illinois, now owned and operated by Petitioner, as Trustee and denies that the Petitioner Trustee and the Missouri-Illinois Railroad Company have acquired any interest in the said Oil and Gas and Other Minerals under the said right of way of the Railroad through adverse possession, but states that the said Railroad has no right to the Oil, Gas, or Other Minerals under its said right of way either by conveyance or by adverse possession.

[fol. 75] (6)

This Defendant, further answering, admits that the following conveyances of right of way appear of record in the Recorder's Office of Marion County, Illinois, but states that said conveyances do not convey the right to the Oil, Gas or Other Minerals under the tracts of land described in the following conveyances, viz.:

Warranty Deed dated January 28th, 1898, recorded November 5, 1900, at Page 533, in Volume 60 of Deed Records, Marion County, Illinois, wherein Jacob Shanafelt and Annie Shanafelt conveyed for the consideration of Three Hundred Dollars ($300.00), to the The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois:

"A strip of ground for right of way for said Company sixty (60) feet wide over and across the North One-Half of the Northeast Quarter of Section Twenty (20), Town-Two (2) North, Range Two (2) East of the Third Principal Meridian, where said Railroad is now located";

Warranty Deed dated August 13th, 1896, recorded November 19th, 1897, at Page 261, in Volume 55 of Deed Records, Marion County, Illinois, wherein William Young and Emma Young, his wife, for the consideration of One Hundred Fifty Dollars ($150.00) conveyed to The Centralia & Chester Railroad Company the following described right of way in Marion County, Illinois:

"A strip of land for right of way for said Railroad Company sixty (60) feet wide over and across the southwest quarter of the northeast quarter of Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian,"

but that the said conveyance vested only an easement for railroad purposes over said tract of land, and that the title to the said minerals remains in the landowners, William Young and Emma Young, his wife, and that the Magnolia Petroleum Company is the owner of an Oil and Gas Lease which covers the whole of the southwest quarter of the northeast quarter of said Section Twenty (20) which covers and includes the Oil, Gas and Other Minerals under the strip of land hereinabove last described, and that the Rail- [fol. 76] road Company has no right, title, or interest to the said Oil and Gas and other Minerals thereunder; and

Warranty Deed dated August 14th, 1896, recorded November 19, 1897, in Volume 55, at Page 260, of the Record of Deeds, Marion County, Illinois, wherein Caleb Bower and Sarah A. Bower, his wife, for the consideration of One Hundred Dollars ($100.00) conveyed to The Centralia & Chester Railroad Company, the following described right of way in Marion County, Illinois, to-wit:

"A strip of ground sixty-six (66) feet wide for right of way for said Railroad Company over and across the east one-half of the northwest quarter of the southwest quarter of Section Twenty (20), Town- Two (2) North, Range Two (2) East of the Third Principal Meridian";

but that the said conveyance did not pass title to the Oil and Gas and Other Minerals and that this Defendant, The Ohio Oil Company is the owner of an Oil and Gas Lease from the landowner owning the fee simple title and the Oil, Gas and Other Minerals under the right of way of the said Railroad Company hereinabove last described, and that the

said Railroad Company has no right to drill for Oil or Gas or to remove the same from under this said right of way; and

Warranty Deed dated January 3, 1898, recorded January 25, 1898, at Page 577, in Volume 56 of Deed Records of Marion County, Illinois, wherein Caroline Rusler, a widow, for the consideration of One Hundred Twenty Dollars and Forty Cents ($120.40) conveyed to the The Centralia & Chester Railroad Company a right of way over and across the following described real estate in Marion County, Illinois, to-wit:

"A strip of ground for right of way for said Company, sixty (60) feet wide over and across the southeast quarter of the northeast quarter and the west one-half of the northwest quarter of the southwest quarter and the southeast quarter of the northwest quarter all of said lands in Section Twenty (20) Town Two (2) North, Range Two (2) East of the Third Principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located;"

[fol. 77] and that the said Deed did not convey the Oil, Gas and Other Minerals under the said strip of land therein described, but that the title thereto remained in the landowner, and that this Defendant, The Ohio Oil Company, holds an Oil and Gas Lease covering the fee simple title in and to the premises described as: West One Half of the Northwest Quarter of the Southwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Twenty (20) which gives it the right, under the terms of its Lease, to prospect and develop the premises for Oil and Gas subject to a one-eighth (⅛th) royalty interest in the owner of the fee, and that at the time the said Caroline Rusler, a widow, made the aforesaid Deed, hereinabove last described to said Railroad Company, that the said Caroline Rusler was the owner of an undivided one-half (½) interest only in the fee in said premises, and that the said Caroline Rusler, by her Deed could not convey the title even for an easement as to the other one-half (½) interest in the said real estate, as to which she did not hold title, and that the said Deed of the said Caroline Rusler did not purport to convey a fee simple interest in said premises, but only an easement therein for the construction of the said railroad right of way.

(7)

This Defendant, further answering, states that although the said Railroad has been in possession of the said premises and has used the same for railroad right of way and has laid railroad tracks over the said premises, still that the said Railroad and the said Trustee have not been in the open, actual, visible and exclusive possession of the Oil, Gas and Other Minerals under the said premises, and have never been in the actual, visible, and exclusive and open possession of the said Oil, Gas and Other Minerals under the said premises;

And this Defendant, further answering, states that the said Trustee and the said Railroad have not by adverse possession acquired any title in or to the said Oil, Gas or Other Minerals in or under the said premises; and

(8)

This Defendant, further answering, states that the said Trustee, and the said Missouri-Illinois Railroad, is not now [fol. 78] lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to, and denies that the Trustee, and the said Railroad Company is now lawfully vested with title to all of the Oil and Mineral Rights under the land herein referred to; and

(9)

This Defendant, further answering, denies that numerous Oil Wells have been drilled in close proximity to Trustee's right of way, and that unless prompt action be taken to remove the Oil underlying the said right of way it will be drawn into the wells on adjoining lands and that the value thereof will be forever lost to the Stockholders and Creditors of the Missouri-Illinois Railroad Company; and this Defendant, further answering, states the facts to be that the Stockholders, Creditors, of the said Missouri-Illinois Company, and the said Railroad Company and the Trustee thereof, have no right, title, or interest in the Oil or Gas underlying the right of way of the said Company; and

(10)

This Defendant, further answering, denies that the Court of Bankruptcy by reason of its Trustee's possession of said

property, has jurisdiction of said property under Section Seventy-Seven (77) of the Bankruptcy Act, to determine all questions respecting title thereto, and denies that pending the determination of said Title, said Court has jurisdiction to instruct and direct the Trustee to take such action as the Court may deem advisable to prevent waste of said Oil and to recover and salvage it for the interest of the owners as their rights may be by this Court hereinafter determined; and denies that the said Court has authority to direct that the expense thereof be paid out of the proceeds of the Oil so removed, and denies that there should be any drilling on the right of way prior to the adjudication of adverse claims respecting the title in this said proceeding; and this Defendant denies that this Court has jurisdiction in this proceedings to determine title to the Oil, Gas and Other Minerals under said right of way, and denies that the said Trustee is or ever has been in possession of the Oil, Gas and Other Minerals under said right of way; and

[fol. 79] (11)

This Defendant, further answering, denies that the Blackstock Oil Company, or any other Company, under Lease from said Trustee, has any right, title, power or authority to drill upon the said right of way for Oil or Gas, and further states that the Bid of the said Blackstock Oil Company is not attached to the Petition in this cause, and that the Petition, therefore, does not show what it is proposed to do with reference to drilling on said right of way, and that it would be extremely unfair and unjust to permit the drilling of said premises for Oil and Gas pending determination of the title of the adverse claimants and to permit payment of the expenses thereof out of the proceeds from Oil recovered, when the effect of such an Order would be to confiscate the property of this Defendant and the other Defendants without any compensation therefor and permit the Drilling Contractor to exploit the property of said Defendant, and the other Defendants, and to indulge in a large amount of drilling and expenses upon the said premises when there is no Law, Statute, or authority under the Law authorizing such a procedure, which would amount to a wrongful confiscation of the Oil and Property of this Defendant; and

(12)

This Defendant, further answering, denies that the Court should enjoin this Defendant from asserting any title in and to the land or to the Mineral, Oil or Gas Deposits in and under said right of way or extracted therefrom, and denies that the Court should find and decree that all Oil, Gas and Mineral Rights in and under aforesaid right of way in and across the aforesaid Section Twenty (20), Town-Two (2) North, Range Two (2) East of the Third Principal Meridian, Salem Township, Marion County, Illinois, is now vested in the Petitioner, as Trustee of the Missouri-Illinois Railroad Company; and this Defendant, further answering, denies that the Trustee should be authorized to forthwith execute a contract with the Blackstock Oil Company, substantially in the form as Exhibit "A" filed with said Petition, and as therein provided, to make advances and payments out of funds in Petitioner's possession as Trustee, Missouri-Illinois Railroad Company, and to other-[fol. 80] wise carry out the terms and conditions of said Contract; and this Defendant, further answering, denies that the Trustee, pending determination of adverse claims of title should be authorized to sell and convey and to transfer title to any Oil or Gas removed from the aforesaid premises, free and clear of all liens or claims of others, predicated upon alleged adverse ownership of any rights in the said premises; and says that such an order, if made, would be void; and this Defendant, further answering, denies the right of the Trustee and the authority of the Court to dissipate the assets of the Railroad Company by contracting for the expenditure of large sums of money in a line of business foreign to that for which it was incorporated, and for which it might never be reimbursed, to exploit right of way lands for the production of Oil and Gas to which it has no title, thereby causing great damage to the rightful owners of such Oil and Gas, for which it would be held to account.

(13)

This Defendant, further answering, denies that the Trustee should be directed to keep separate account of the expense of drilling each well, and to keep separate account of all Oil and Gas removed from each separate tract to which adverse claim is herein asserted, and denies that

Trustee, after paying the expenses provided for in Article I of the Contract therewith filed with said Petition as Exhibit "A," and such other expenses as may be reasonably necessary in removing, conserving and marketing the Oil or Gas from said premises, should be allowed to reimburse himself therefor out of the proceeds of the sale of said Oil and/or Gas; and this Defendant, further answering, denies that the Trustee should be directed to hold the remainder of said proceeds for the account of whom concerned, hereafter to be determined by appropriate orders of this Court; and denies that the Trustee of the Railroad is entitled to the Oil or Gas in or under the said premises; and denies that the Trustee or the Railroad is entitled to drill for Oil or Gas on the said right of way, and states the fact to be that the Charter of the said Railroad Company recognizes and recites that the said Railroad Company had only the right to acquire a right of way or surface easement for railroad purposes over the said premises, and had no right [fol. 81] to acquire the fee simple title to the Oil, Gas and Other Minerals thereunder; and

(14)

This Defendant, further answering, denies that the Petition is positively verified; and that the Trustee merely verifies said Petition on information and belief, and merely alleges on information and belief that the Trustee has title to the Oil, Gas and Other Minerals under the said premises, and that, under such an allegation and verification, this Court has no right, power, or authority to issue a temporary restraining order as against this Defendant, and has no right, power, or authority to authorize the Trustee to proceed to drill for Oil and Gas under the said premises; and

(15)

This Defendant, further answering, states that the said Petition shows upon its face that any rights that the said Trustee and said Railroad Company may have in the railroad right of way described in said Petition is merely a surface easement and that the said Petitioner and the said Railroad Company have no right, title, or interest in or to the Oil or Gas, or Other Minerals under the said Railroad right of way, and have no right to drill for oil or gas upon

the said Railroad right of way; and, further, no summons have been issued for the landowners and owners of mineral interests under said right of way, and that, therefore, said landowners and owners of said mineral interests are not properly before the Court, and that this Court, in addition to all the other reasons heretofore urged, has no jurisdiction to determine the question of title as to these premises for want of necessary parties before the Court.

The Ohio Oil Company, Defendant. By Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for [fol. 82] said Defendant. Cobbs, Logan, Roos & Armstrong, Tenth Floor, Mississippi Valley Trust Building, 506 Olive Street, St. Louis, Missouri, and Craig & Craig, 1803-1805-1807 Broadway Avenue, Mattoon, Illinois, Attorneys for Defendant.

Copy of above answer received this 28th day of November, 1938.

Russell L. Dearmont, Counsel for Trustee, per N. J. Stevens.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF SEPARATE PETITIONS FOR APPEAL OF MAGNOLIA PETROLEUM COMPANY AND OHIO OIL COMPANY, ETC.—December 10, 1938

Separate petitions for appeal to U. S. C. C. A., Eighth Circuit and for supersedeas, as well as separate assignment of errors on such proposed appeals of the Ohio Oil Co., and Magnolia Petroleum Co., from order entered November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Ry. Co. to contract for drilling wells on and removal and marketing of oil and gas taken from right of way of debtor at Salem, Illinois, etc., filed.

In United States District Court

Record Entry Showing Filing of Separate Notices of Appeal of Magnolia Petroleum Oil Co., and Ohio Oil Co., and Presentation of Separate Petitions for Appeals; etc.—December 12, 1938

Separate notices of appeal to U. S. C. C. A. Eighth Circuit, of the Ohio Oil Co., and Magnolia Petroleum Co., from order entered on November 14, 1938, authorizing Guy A. Thomp-
[fol. 83] son, etc., to deal and contract with the Blackstock Oil Co., in relation to the oil and gas underlying the right of way of the Missouri-Illinois Railroad Company, at Salem, Illinois, etc., filed in duplicate and a copy of each of said notices mailed by the Clerk of this Court to Guy A. Thompson, Trustee, etc., pursuant to provisions of Rule 73 of Rules of Civil Procedure.

Separate costs bonds of the Ohio Oil Co., and Magnolia [Petrolaum] Co., on such proposed appeals in the sum of $250.00 each, presented, approved and filed.

Separate petitions of The Ohio Oil Co., and Magnolia Petroleum Co., for allowance of appeals to U. S. C. C. A., Eighth Circuit, from order entered on November 14, 1938, authorizing Guy A. Thompson, Trustee, etc., to deal and contract with the Blackstock Oil Co., in relation to the oil and gas underlying the right of way of the Missouri-Illinois Railroad Co., at Salem, Ill., etc., together with separate assignment of errors on such proposed appeals, presented, and separate orders filed granting said appeals but denying supersedeas, and directing petitioners to file herein within ten days their cost bonds on appeal in the sum of $250.00 each, to be approved by the Court. Separate cost bonds on appeal of The Ohio Oil Co., and Magnolia Petroleum Co., in the sum of $250.00 each, presented approved and filed. Separate citations issued and filed.

IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

No. 6935

PETITION FOR APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 10, 1938

In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

[fol. 84] Petition #1167

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Plaintiff,

vs.

THE OHIO OIL COMPANY, KINGWOOD OIL COMPANY, MAGNOLIA PETROLEUM COMPANY et al., Defendants

To the Honorable George H. Moore, United States Judge, for the Eastern Division, Eastern Judicial District of Missouri:

Your petitioner, Magnolia Petroleum Company, a corporation, believing itself aggrieved by the order of this court entered in the above entitled cause on November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract for the drilling of wells on and the removal and marketing of oil and gas taken from the premises described in Petition No. 1167 filed herein, and directing that the proceeds from the sale of such oil and gas, after deducting therefrom the expenses of drilling for, and removing, conserving and marketing said oil and gas be turned over to said Trustee and vesting title to said oil and gas underlying or removed from said premises in said Trustee, with the right to convey said title free and clear of all claims, and enjoining and restraining this defendant and others from interfering with the drilling of said wells and from asserting or attempting to enforce, other than in these proceedings, any claim to said premises and the oil and gas under the same and from attacking or interfering

with the title of any purchaser of said oil and gas, prays an appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit. The errors upon which said appeal is based are specified in the assignment of errors which is filed herewith and made a part hereof.

Your petitioner prays further that a citation be issued to the said Guy A. Thompson, Trustee, directing him to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers, duly authenticated, upon which said order was made, be transmitted to the [fol. 85] United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner prays further that, pending this appeal, this Court grant it a stay of said order and fix the amount of the supersedeas bond which your petitioner shall give therefor.

Magnolia Petroleum Company, by Craig & Craig, and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Defendant, Magnolia Petroleum Company.

Duly sworn to by Thos. H. Cobbs. Jurat omitted in printing.

Copy received Dec. 9, 1938
Guy A. Thompson, Trustee Mo. Ill. R. R. Co., Debtor, by Thos. T. Railey, Atty. for Trustee.

[fol. 86] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS ON APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 10, 1938

Comes now Magnolia Petroleum Company, a corporation, appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of this appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order of this Court entered by this Court in this cause on the 14th day of November, 1938.

I

The District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, because the District Court is without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction for the following reasons:

(1) It affirmatively appears from the allegations contained in said petition that this is a controversy in equity between said Trustee, as such, and adverse claimants, including this appellant, concerning property acquired or claimed by said Trustee, and that, as made and provided by Title 11, Section 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, said proceedings should have been instituted as a separate cause of action in the same manner as the subsidiary debtor, Missouri-Illinois Railroad Company, might have instituted them if the proceedings in bankruptcy had not been instituted.

(2) That the proceeding and hearing leading up to the order of November 14, 1938 here appealed from were had over the objection of this appellant to the jurisdiction of the District Court and that, therefore, as made and provided by Title 11, Sec. 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, the District Court, in entering said order, was without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction.

(3) The jurisdiction of the District Court, as provided in Title 11, Sec. 205(a), U. S. C. A., depends upon whether or not petitioner, Trustee, had possession of or title to the [fol. 87] subject matter of the controversy, namely, oil and gas underlying the real estate described in said petition, and that the determination of this question depends upon the construction given or to be given to the deeds set forth in said petition and the facts shown in a final hearing, and that it appears from the record in this cause that, until the time of entering the order here appealed from, the Judge of the United States District Court had not had a final hearing on and had not properly determined this question, which was the basis of his jurisdiction to entertain this cause.

(4) The United States District Court, in the order appealed from, purports, beyond and in excess of its juris-

diction, to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, although, on the face of said petition, it affirmatively appears that there is presently existing a dispute as to the title to and ownership of said oil and gas.

(5) The United States District Court, acting beyond and in excess of its jurisdiction, by the order complained of, authorized said Trustee to enter into contracts with Blackstock Oil Company, a stranger to this record, and make arrangements for the drilling of wells and payment therefor, the removal and marketing of oil and gas that may be taken from said premises described in said petition, although it affirmatively appears from said petition that there is presently existing a dispute as to the title and ownership of said oil and gas.

(6) It appears from the record in this proceeding that there are landowners and owners of mineral interests under the right-of-way of said Railroad who were not before the Court at the time of the entry of said order of November 14, 1938, and that appellant urged that the District Court had no jurisdiction to enter said order of November 14, 1938 because of lack of necessary parties and because said landowners and mineral owners were not before said Court.

II

The District Court erred in finding in said order appealed from "that immediate action is necessary to conserve the [for 88] oil supply underlying said property, for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court" in that there was no substantial evidence or proof that any other drilling operations adjacent to said property did or could drain any oil or gas lying underneath said premises. The preponderating evidence was to the contrary.

III

Said order of November 14, and all proceedings had leading up to said order, are a nullity, because it appears from the record that the United States District Court had and could acquire no jurisdiction over the subject matter of this

proceeding, namely, the oil and gas which may underlie the premises described in said petition and which is situated in the State of Illinois and out of the jurisdiction of said Court.

IV

The United States District Court erred and acted in excess of its jurisdiction in granting injunctive relief in favor of the Blackstock Oil Company, as provided in paragraph six of said order, because it affirmatively appears from said petition and proceedings that said Blackstock Oil Company was not a party to these proceedings and is a stranger to these proceedings and because there was no legal or equitable justification for said injunction.

V

The United States District Court erred and acted in excess of its jurisdiction and beyond its jurisdiction in purporting to enter an interlocutory order, in regard to the subject matter of this controversy, namely oil and gas beneath the premises described in said petition, because it affirmatively appears from said order and this record that said order is in fact a final order as to all oil and gas, which may be taken from said premises under and in accordance with said order, and that said final order amounts to the taking of this appellant's property without due process of law and without any adequate hearing and contrary to the 14th Amendment to the Constitution of the United States.

[fol. 89]

VI

The United States District Court erred in attempting to vest in Trustee the title to and authorize Trustee to deal in relation to any oil or gas, which might be found beneath the premises described in said petition or produced from said premises, until said Court had determined the question of the ownership of the fee simple title in and to the premises from which said oil and gas might be produced.

VII

The United States District Court erred in entering the order of November 14, 1938, because the record in this proceeding shows that Trustee was not and is not the owner of the oil and gas under the land described in his petition

and was not and is not in possession of said oil and gas and should not have been given any title to or control over the same.

VIII

The United States District Court erred in finding that Trustee was the owner and in possession of the property in controversy, i. e., the oil and gas under the property described in his petition, because the deeds mentioned in his petition gave only an easement for a right-of-way and because the record shows there was a real dispute which could not be decided without a final hearing.

IX

The United States District Court erred in entering an injunction against appellant because the record in this proceeding shows that appellant claims to own the oil and gas under some of the land described in Trustee's petition and also shows that Trustee owns only an easement for a right-of-way over said land and does not own the oil and gas under said land.

X

The United States District Court erred in entering said order of November 14, 1938, because that order gave to a stranger to this record, Blackstock Oil Company, the right to remove the real subject matter of this controversy, the oil and gas under the right-of-way of the Missouri-Illinois [fol. 90] Railroad, and also gave said Blackstock Oil Company the right to sell said oil and gas at any price without even requiring that all sales should be made at the fair market value of the oil and gas so sold at the well or wells when and where the same was produced and marketed.

XI

That the United States District Court erred in entering said order of November 14, 1938, because that order was entered on the petition filed herein, which petition had not been verified absolutely to be true, but was verified only on belief.

Wherefore, Magnolia Petroleum Company prays that the said order of November 14, 1938, entered herein by the United States District Court for the Eastern Division of

the Eastern Judicial District of Missouri, be reversed, as to Magnolia Petroleum Company, and that this cause be remanded to said United States District Court with instructions as to further proceedings herein, and for such other and further relief as may be just and proper in the premises.

Respectfully submitted, Magnolia Petroleum Company, by Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Magnolia Petroleum Company.

Dated at St. Louis, Missouri, this 10th day of December, 1938.

Duly sworn to by Thos. H. Cobbs jurat omitted in printing.

[fol. 91] Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee Mo. Ill. R. R. Co., Debtor,
by Thos. T. Railey, Atty. for Trustee.

IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL TO MAGNOLIA PETROLEUM COMPANY—Filed December 12, 1938

The petition of Magnolia Petroleum Company, a corporation, for an appeal from the order entered in this cause on November 14, 1938, directing and authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Com- [fols. 92-94] pany, to contract with Blackstock Oil Company in relation to oil and gas under the right-of-way of the Missouri-Illinois Railroad Company near Salem, Illinois, and authorizing said Trustee to remove said oil and gas and vesting said Trustee with the title to any and all of said oil and gas which might be removed from said real estate and enjoining Magnolia Petroleum Company and others from exercising any rights which they may have in and to said oil and gas, having been duly considered, said petition for appeal from said order is hereby granted and an appeal is hereby allowed without [supersedeas] to the United States Circuit Court of Appeals for the Eighth Circuit upon

the Magnolia Petroleum Company giving a cost bond in the sum of $250.00 within ten days from the date of the entry of this order, conditioned as required by law, to be approved by this Court or one of the judges thereof and that a citation upon this appeal issued directed to Guy A. Thompson, Trustee, and made returnable 40 days from the day on which the same is issued.

Geo. H. Moore, Judge of the United States District Court.

Dated at St. Louis, Missouri this 12th day of December, 1938.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 95] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL OF MAGNOLIA PETROLEUM COMPANY—Filed December 12, 1938

Notice is hereby given that Magnolia Petroleum Company, a corporation, one of the defendants in the above entitled proceeding, brought by Guy A. Thompson, Trustee, for determination of title and for advice and direction respecting certain proposed oil operations on the right-of-way of Missouri-Illinois Railroad near Salem, Illinois, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on November 14, 1938 by the Honorable George H. Moore, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, authorizing Guy A. Thompson, Trustee, to deal and contract with the Blackstock Oil Company in relation to the oil and gas underlying the right-of-way of the Missouri-Illinois Railroad in Section 20, Township 2 North, Range 2 East of the 3rd P. M. in Salem Township, Marion County, Illinois, and authorizing the removal of said oil and gas from under said right-of-way, and vesting title to any and all oil and gas

removed from said right-of-way in said Trustee and enjoining Magnolia Petroleum Company, et al., from exercising any of the rights which it may have in and to the oil and gas under said right-of-way; and will ask the United [fols. 96-97] States Circuit Court of Appeals for the Eighth Circuit to vacate said order of November 14 1938 and all parts thereof in so far as said order applies to or affects Magnolia Petroleum Company.

Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Magnolia Petroleum Company.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 98] In United States District Court of the Eastern Division of the Eastern Judicial District of Missouri

[Title omitted]

Statement of Points to be Relied Upon on Appeal of Magnolia Petroleum Company—Filed January 14, 1939

Comes now Magnolia Petroleum Company and states that, on its appeal to the United States Circuit Court of [fol. 99] Appeals for the Eighth Circuit in the above entitled cause, it will rely upon the following points:

I.

The United States District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, from which said order this appeal was taken, for the reason that it was without jurisdiction to enter said order and in entering said order was acting in excess of and beyond its jurisdiction, because:

(1) This is a controversy in bankruptcy between said Trustee, as such, and adverse claimants and should have been instituted as a separate cause of action in the same jurisdiction and in the same manner as the Subsidiary Debtor, Missouri-Illinois Railroad Company, might have

instituted it if these proceedings in bankruptcy had not been filed.

(2) This is not a proceedings by a Trustee in possession within the contemplation of Title 11, Section 205 (a), U. S. C. A.

(3) Under the law of the State of Illinois, even though the deeds set forth in said petition be construed to have conveyed a fee simple title to the Subsidiary Debtor, Missouri-Illinois Railroad Company, neither said Subsidiary Debtor nor its Trustee acquired any possessory right or title to oil and gas underlying said real estate, and therefore the District Court had no jurisdiction to entertain this summary proceedings.

(4) The United States District Court erred, in the order appealed from, in purporting to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, when the Trustee of said Subsidiary Debtor had no such title.

(5) The United States District Court erred, in the order appealed from, in purporting to vest in the Blackstock Oil Company, a stranger to this record, authority to drill for, recover and market oil and gas taken from the premises described in said petition until the Court determined the title to and rights in said premises.

[fol. 100] (6) Under the record and evidence, the Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which might be found under or recovered from the premises described in said petition and located in the State of Illinois.

II

The United States District Court erred in failing to dismiss the Trustee's petition, because under the undisputed evidence, the Trustee's complaint is without equity.

III

The United States District Court erred in granting a temporary injunction in this cause, because there was no substantial evidence or proof that any other drilling operations adjacent to said property were threatened, or, if carried on, could drain any oil or gas from said premises.

IV

Said order of November 14, 1938, here appealed from, authorizes the taking and disposition of Appellant's property without due process of law and without any adequate and final hearing, contrary to the Fourteenth Amendment to the Constitution of the United States.

V

The United States District Court erred in entering said order of November 14, 1938, here appealed from, because the deeds described in the Trustee's petition and received in evidence gave only an easement for a right of way over and across and not the fee simple title to the premises described in said deeds, and because the language used in said deeds and the circumstances under which they were given clearly show that the grantors therein intended to and did give to the grantee, Railroad Company, only the right to build and operate a railroad over and across the property described therein and not to use said property for any other purpose whatsoever.

VI

Said order of November 14, 1938, here appealed from, is unjust and inequitable and erroneous in that it authorizes a stranger to the record to remove, dispose of and sell, [fol. 101] without restriction, the real subject matter of the controversy, before final determination of the rights of the parties.

Magnolia Petroleum Company, by Craig & Craig and Cobbs, Logan, Roos and Armstrong, by Thos. H. Cobbs, Its Attorneys.

Copy received 1/14/39.

Thos. T. Railey.

In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

Petition for Appeal of Ohio Oil Company—Filed December 10, 1938

In the Matter of Missouri Pacific Railroad Company, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

No. 6935

Petition #1167

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Plaintiff,

vs.

The Ohio Oil Company, Kingwood Oil Company, Magnolia Petroleum Company, et al., Defendants

To the Honorable George H. Moore, United States Judge, for the Eastern Division, Eastern Judicial District of Missouri:

Your petitioner, The Ohio Oil Company, a corporation, believing itself aggrieved by the order of this court entered in the above entitled cause on November 14, 1938, authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract for the drilling of wells on and the removal and marketing of oil and gas taken from the premises described in Petition No. 1167 filed herein, and directing that the proceeds from the sale of such oil and gas, after deducting therefrom the expenses of drilling for, and removing, conserving and marketing said oil and gas be [fol. 102] turned over to said Trustee and vesting title to said oil and gas underlying or removed from said premises in said Trustee, with the right to convey said title free and clear of all claims, and enjoining and restraining this defendant and others from interfering with the drilling of said wells and from asserting or attempting to enforce, other than in these proceedings, any claim to said premises and the oil and gas under the same and from attacking or in-

terfering with the title of any purchaser of said oil and gas, prays an appeal from said order to the United States Circuit Court of Appeals for the Eighth Circuit. The errors upon which said appeal is based are specified in the assignment of errors which is filed herewith and made a part hereof.

Your petitioner prays further that a citation be issued to the said Guy A. Thompson, Trustee, directing him to appear before the United States Circuit Court of Appeals for the Eighth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers, duly authenticated, upon which said order was made, be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

Your petitioner prays further that, pending this appeal, this Court grant it a stay of said order and fix the amount of the supersedeas bond which your petitioner shall give therefor.

The Ohio Oil Company, by Craig & Craig, and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Attorneys for Defendant, The Ohio Oil Company.

Duly sworn to by Thos. H. Cobbs, jurat omitted in printing.

[fol. 103] Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee. Mo. Ill. R. R. Co., Debtor. By Thos. T. Railey, Atty. for Trustee.

In United States District Court

Assignment of Errors on Appeal of Ohio Oil Company—Filed December 10, 1938

Comes now The Ohio Oil Company, a corporation, appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of this appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order of this Court entered by this Court in this cause on the 14th day of November, 1938.

I

The District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, because the District Court is without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction for the following reasons:

(1) It affirmatively appears from the allegations contained in said petition that this is a controversy in equity between said Trustee, as such, and adverse claimants, in-
[fol. 104] cluding this appellant, concerning property acquired or claimed by said Trustee, and that, as made and provided by Title 11, Section 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, said proceedings should have been instituted as a separate cause of action in the same manner as the subsidiary debtor, Missouri-Illinois Railroad Company, might have instituted them if the proceedings in bankruptcy had not been instituted.

(2) That the proceeding and hearing leading up to the order of November 14, 1938, here appealed from, were had over the objection of this appellant to the jurisdiction of the District Court and that, therefore, as made and provided by Title 11, Sec. 46, U. S. C. A., as amended June 22, 1938, Chapter 575, Sec. 1, 52 Stat. 854, the District Court, in entering said order, was without jurisdiction in the premises and was acting in excess of and beyond its jurisdiction.

(3) The jurisdiction of the District Court, as provided in Title 11, Sec. 203(b), U. S. C. A., depends upon whether or not petitioner, Trustee, had possession of or title to the subject matter of the controversy, namely, oil and gas underlying the real estate described in said petition, and that the determination of this question depends upon the construction given or to be given to the deeds set forth in said petition and the facts shown in a final hearing, and that it appears from the record in this cause that, until the time of entering the order here appealed from, the Judge of the United States District Court had not had a final hearing on and had not properly determined this question, which was the basis of his jurisdiction to entertain this cause.

(4) The United States District Court, in the order appealed from, purports, beyond and in excess of its jurisdic-

tion, to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said petition, although, on the face of said petition, it affirmatively appears that there is presently existing a dispute as to the title to and ownership of said oil and gas.

[fol. 105] (5) The United States District Court, acting beyond and in excess of its jurisdiction, by the order complained of, authorized said Trustee to enter into contracts with Blackstock Oil Company, a stranger to this record, and make arrangements for the drilling of wells and payment therefor, the removal and marketing of oil and gas that may be taken from said premises described in said petition, although it affirmatively appears from said petition that there is presently existing a dispute as to the title and ownership of said oil and gas.

(6) It appears from the record in this proceeding that there are landowners and owners of mineral interests under the right-of-way of said Railroad who were not before the Court at the time of the entry of said order of November 14, 1938, and that appellant urged that the District Court had no jurisdiction to enter said order of November 14, 1938 because of lack of necessary parties and because said landowners and mineral owners were not before said Court.

II

The District Court erred in finding in said order appealed from "that immediate action is necessary to conserve the oil supply underlying said property, for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court", in that there was no substantial evidence or proof that any other drilling operations adjacent to said property did or could drain any oil or gas lying underneath said premises. The preponderating evidence was to the contrary.

III

Said order of November 14, and all proceedings had leading up to said order, are a nullity, because it appears from the record that the United States District Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which may underlie the

premises described in said petition and which is situated in the State of Illinois and out of the jurisdiction of said Court.

[fol. 106] IV

The United States District Court erred and acted in excess of its jurisdiction in granting injunctive relief in favor of the Blackstock Oil Company, as provided in paragraph six of said order, because it affirmatively appears from said petition and proceedings that said Blackstock Oil Company was not a party to these proceedings, and is a stranger to these proceedings and because there was no legal or equitable justification for said injunction.

V

The United States District Court erred and acted in excess of its jurisdiction and beyond its jurisdiction in purporting to enter an interlocutory order, in regard to the subject matter of this controversy, namely oil and gas beneath the premises described in said petition, because it affirmatively appears from said order and this record that said order is in fact a final order as to all oil and gas, which may be taken from said premises under and in accordance with said order, and that said final order amounts to the taking of this appellant's property without due process of law and without any adequate hearing and contrary to the 14th Amendment to the Constitution of the United States.

VI

The United States District Court erred in attempting vest in Trustee the title to and authorize Trustee to deal in relation to any oil or gas, which might be found beneath the premises described in said petition or produced from said premises, until said Court had determined the question of the ownership of the fee simple title in and to the premises from which said oil and gas might be produced.

VII

The United States District Court erred in entering the order of November 14, 1938, because the record in this proceeding shows that Trustee was not and is not the owner of the oil and gas under the land described in his

petition and was not and is not in possession of said oil and gas and should not have been given any title to or control over the same.

[fol. 107]

VIII

The United States District Court erred in finding that Trustee was the owner and in possession of the property in controversy, i. e., the oil and gas under the property described in his petition, because the deeds mentioned in his petition gave only an easement for a right-of-way and because the record shows there was a real dispute which could not be decided without a final hearing.

IX

The United States District Court erred in entering an injunction against appellant because the record in this proceeding shows that appellant claims to own the oil and gas under some of the land described in Trustee's petition and also shows that Trustee owns only an easement for a right-of-way over said land and does not own the oil and gas under said land.

X

That the United States District Court erred in entering said order of November 14, 1938, because that order gave to a stranger to this record, Blackstock Oil Company, the right to remove the real subject matter of this controversy, the oil and gas under the right-of-way of the Missouri-Illinois Railroad, and also gave said Blackstock Oil Company the right to sell said oil and gas at any price without even requiring that all sales should be made at the fair market value of the oil and gas so sold at the well or wells when and where the same was produced and marketed.

XI

That the United States District Court erred in entering said order of November 14, 1938, because that order was entered on the petition filed herein, which petition had not been verified absolutely to be true, but was verified only on belief.

Wherefore, The Ohio Oil Company prays that the said order of November 14, 1938, entered herein by the United States District Court for the Eastern Division of the East-

ern Judicial District of Missouri, be reversed, as to The Ohio Oil Company, and that this cause be remanded to said [fol. 108] United States District Court with instructions as to further proceedings herein, and for such other and further relief as may be just and proper in the premises.

Respectfully submitted, The Ohio Oil Company, By Craig & Craig, and Cobbs, Logan, Rogg & Armstrong, by Thos. H. Cobb, Attorneys for The Ohio Oil Co.

Dated at St. Louis, Missouri, this 10th day of December, 1938.

Duly sworn to by Thos. H. Cobbs. Jurat omitted in printing.

Copy received Dec. 9, 1938.
Guy A. Thompson, Trustee, Mo.-Ill. R. R. Co., Debtor. By Thos. T. Railey, Atty. for Trustee.

[fol. 109] IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL TO OHIO OIL COMPANY—Filed December 12, 1938

The petition of The Ohio Oil Company, a corporation, for an appeal from the order entered in this cause on November 14, 1938, directing and authorizing Guy A. Thompson, Trustee for Missouri-Illinois Railroad Company, to contract with Blackstock Oil Company in relation to oil and gas under the right-of-way of the Missouri-Illinois Railroad Company near Salem, Illinois, and authorizing said Trustee to remove said oil and gas and vesting said Trustee with the title to any and all of said oil and gas which might be removed from said real estate and enjoining The Ohio Oil Company and others from exercising any rights which they may have in and to said oil and gas, having been duly considered, said petition for appeal from said order is hereby granted and an appeal is hereby allowed without supersedeas to the United States Circuit

Court of Appeals for the Eighth Circuit upon The Ohio Oil Company giving a cost bond in the sum of $250.00, within ten days from the date of the entry of this order, conditioned as required by law, to be approved by this Court or one of the judges thereof and that a citation upon this appeal issue directed to Guy A. Thompson, Trus-
[fols. 110-111] tee, and made returnable 40 days from the day on which the same is issued.

George H. Moore, Judge of the United States District Court.

Dated at St. Louis, Missouri this 12th day of December, 1938.

Bond on appeal for $250.00, approved and filed December 12, 1938, omitted in printing.

[fol. 112] In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

[Title omitted]

Notice of Appeal of Ohio Oil Company—Filed December 12, 1938

Notice is hereby given that The Ohio Oil Company, a corporation, one of the defendants in the above entitled pro-
[fols. 113-114] ceeding, brought by Guy A. Thompson, Trustee, for determination of title and for advice and direction respecting certain proposed oil operations on the right-of-way of Missouri-Illinois Railroad near Salem, Illinois, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on November 14, 1938 by the Honorable George H. Moore, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, authorizing Guy A. Thompson, Trustee, to deal and contract with the Blackstock Oil Company in relation to the oil and gas underlying the right-of-way of the Missouri-Illinois Railroad in Section 20, Township 2 North, Range 2 East of the 3rd P. M. in Salem Township, Marion County, Illinois, and authorizing the removal of said oil and gas from under said right-of-way, and vesting title to any and all oil and gas removed

from said right-of-way in said Trustee and enjoining The Ohio Oil Company, et al. from exercising any of the rights which it may have in and to the oil and gas under said right-of-way, and will ask the United States Circuit Court of Appeals for the Eighth Circuit to vacate said order of November 14, 1938 and all parts thereof in so far as said order applies to or affects The Ohio Oil Company.

Craig & Craig, and Cobbs, Logan, Roos & Armstrong,
By Thos. H. Cobbs, Attorneys for The Ohio Oil Co.

Bond on appeal for $250.00, approved and filed Dec. 12, 1938; omitted in printing.

[fol. 115] IN UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL OF OHIO OIL COMPANY—Filed January 14, 1939

[fol. 116] Comes now The Ohio Oil Company and states that, on its appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause, it will rely upon the following points:

I

The United States District Court erred in entering the order of November 14, 1938, on the petition of Guy A. Thompson, Trustee, from which said order this appeal was taken, for the reason that it was without jurisdiction to enter said order and in entering said order was acting in excess of and beyond its jurisdiction, because:

(1) This is a controversy in bankruptcy between said Trustee as such, and adverse claimants and should have been instituted as a separate cause of action in the same jurisdiction and in the same manner as the Subsidiary Debtor, Missouri-Illinois Railroad Company, might have instituted it if these proceedings in bankruptcy had not been filed.

(2) This is not a proceedings by a Trustee in possession within the contemplation of Title 11, Section 205 (a), U. S. C. A.

(3) Under the law of the State of Illinois, even though the deeds set forth in said petition be construed to have conveyed a fee simple title to the Subsidiary Debtor, Missouri-Illinois Railroad Company, neither said Subsidiary Debtor nor its Trustee acquired any possessory right or title to oil and gas underlying said real estate, and therefore the District Court had no jurisdiction to entertain this summary proceedings.

(4) The United States District Court erred, in the order appealed from, in purporting to vest in the Trustee good and sufficient legal title to any and all oil and gas underlying or removed from the premises described in said peti- [fol. 117] tion, when the Trustee of said Subsidiary Debtor had no such title.

(5) The United States District Court erred, in the order appealed from, in purporting to vest in the Blackstock Oil Company, a stranger to this record, authority to drill for, recover and market oil and gas taken from the premises described in said petition until the Court determined the title to and rights in said premises.

(6) Under the record and evidence, the Court had and could acquire no jurisdiction over the subject matter of this proceeding, namely, the oil and gas which might be found under or recovered from the premises described in said petition and located in the State of Illinois.

II

The United States District Court erred in failing to dismiss the Trustee's petition, because under the undisputed evidence, the Trustee's complaint is without equity.

III

The United States District Court erred in granting a temporary injunction in this cause, because there was no substantial evidence or proof that any other drilling operations adjacent to said property were threatened, or, if carried on, could drain any oil or gas from said premises.

IV

Said order of November 14, 1938, here appealed from, authorizes the taking and disposition of Appellant's property without due process of law and without any adequate and final hearing, contrary to the Fourteenth Amendment to the Constitution of the United States.

V

The United States District Court erred in entering said order of November 14, 1938, here appealed from, because the deeds described in the Trustee's petition and received in evidence gave only an easement for a right of way over and across and not the fee simple title to the premises described in said deeds, and because the language used in said deeds and the circumstances under which they were given [fol. 118] clearly show that the grantors therein intended to and did give to the grantee, Railroad Company, only the right to build and operate a railroad over and across the property described therein and not to use said property for any other purpose whatsoever.

VI

Said order of November 14, 1938, here appealed from, is unjust and inequitable and erroneous in that it authorizes a stranger to the record to remove, dispose of and sell, without restriction, the real subject matter of the controversy, before final determination of the rights of the parties.

VII

Said order of November, 1938, insofar as it applies to the property described in deed of January 3, 1898, recorded January 25, 1898 at page 577 in Volume 56 of Deed Records of Marion County, Illinois, executed by Caroline Rusler, is erroneous because, under the undisputed evidence, said grantor owned only an undivided one-half interest in said property and the owners of said other undivided one-half interest have never conveyed their interest in said property to Missouri-Illinois Railroad Company or its predecessors, nor has the fee simple title thereto been acquired by adverse possession.

The Ohio Oil Company, by Craig & Craig and Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Its Attorneys.

Copy received 1/14/39. Thos. T. Railey.

IN DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

Narrative of the Testimony—Filed January 14, 1939

Petition Number 1167

[fol. 119] In the Matter of MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Debtor

In Proceedings for the Reorganization of a Railroad

Number 6935

At a session of Court, held in the District aforesaid, at St. Louis, Missouri, on November 9, 1938, there came before the Honorable George H. Moore, Judge of the United States District Court for hearing, petition of Trustee for determination of title and for advice and directions respecting certain proposed oil operations on right of way near Salem, Illinois, wherein the following proceedings were had:

APPEARANCES

Thomas T. Railey, Esq., and Russell L. Dearmont, Esq., for the Trustee.

Messrs. Craig and Craig, By Craig Van Meter, Esq., for Magnolia Petroleum Company.

Messrs. Craig and Craig, by Craig Van Meter, Esq., and G. E. McCullough, Esq., For the Ohio Oil Company.

STATEMENT BY COUNSEL FOR TRUSTEE

Mr. Railey: If it meets with the approval of the Court, I will make a very brief statement of the facts, and then have two witnesses to introduce.

This matter comes before the Court on a petition filed in behalf of Guy A. Thompson, Trustee of the Missouri-Illinois Railroad Company, Debtor, one of the subsidiary debtors in the Missouri Pacific Reorganization Proceedings.

The right-of way of the Missouri-Illinois Railroad in the County of Marion, Illinois, traverses one of the proven oil fields recently discovered, about four miles west of Salem, Illinois.

The particular petition concerns that part of the right of way over and across Section 20, in Salem Township, approximately a mile, in length. The petition of the Trustee asks that this Court determine certain claims to adverse title to the oil and mineral rights underlying this right of [fol. 120] way, which have been asserted by the three oil companies who have entered their appearances here today.

These are all of the known adverse claimants, although there may be other unknown adverse claimants who may assert some adverse claim to title.

The Trustee has accordingly asked this Court, in his motion, to issue an order of publication bringing in any of those adverse claimants who are unknown (it is unnecessary to bring in these three oil companies, whose appearances have now been entered) and asks that the Court hear evidence and determine these claims to adverse title. Since the printing of this publication will require some time, or may require some time and the oil under the right of way be dissipated and drawn into other wells pending this delay, the Trustee, following precedents often followed in these oil cases, has asked the Court to vest Mr. Thompson, as Trustee of the Missouri-Illinois Railroad, with the same authority that is usually vested in an independent receiver appointed pendente lite, that is, with the power to drill—to enter into a drilling contract, to conserve and sell the oil, and to hold the proceeds of the oil for the account of whom concerned, as determined by the subsequent order of this Court, paying out in oil, as far as possible, the reasonable expenses of drilling, conserving and selling the oil.

The petition of the Trustee sets forth the four deeds upon which this claim to this right of way is predicated. Of course, there is no question that it has claim for right of way purposes, by reason of adverse possession, but its claim to the fee simple title to the property is traced back to these three or four old conveyances, copied in full in the petition, which convey to the Railroad Company a strip of land for right of way sixty feet wide. That is the language in one of them, and they are all substantially to the same effect.

The question, therefore, is whether the conveyance of a strip of land for right of way sixty feet wide is a conveyance of a fee simple title of that land, the description of right of way being merely descriptive and for the purpose of locating the particular narrow strip of land, or whether

that is merely a conveyance of a right of way which would [fol. 121] be a mere easement for railroad purposes and, according to the claim of these adverse claimants, would not authorize the Trustee to drill and retain the oil underlying that property. That is the real question that is before this Court, and it may be necessary for the Court to make up his mind on that question in connection with this particular motion.

The particular proceeding now before you is summary in nature. The courts hold that you, as a bankruptcy court, can enter an order of this kind, with or without notice, on affidavits, on a sworn petition, or on such evidence as you may see fit.

F. E. Bates, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Trustee as follows:

Direct examination.

By Mr. Railey:

My name is F. E. Bates. I am Chief Engineer for Mr. Guy A. Thompson, in his capacity as Trustee of the Missouri Pacific and the Missouri-Illinois Railroad Companies. As Chief Engineer I have charge of matters relating to oil rights on the right of way of the Missouri Pacific and the Missouri-Illinois Railroads. I have made investigations and recommendations with respect to this particular right of way in Section 20, Salem Township, Marion County, Illinois. The field in the vicinity of the Railroad was developed, or the development was started early this year. The first wells were brought in several miles south, and development has progressed northward until it had reached the right of way in September of this year.

I have in my possession, as Chief Engineer, the original right of way deeds which are described in the petition, and those conveyances are correctly set forth in the petition.

Mr. Van Meter: We object to this line of testimony about these deeds for the reason that we contend that the deeds show on their faces that they only purport to convey an easement and not a fee simple title. We would like this objection to stand as to all such matters.

[fol. 122] The Court: Very well. It will be heard subject to your objection.

Mr. Van Meter: I am not objecting to Mr. Railey stating that the petition correctly sets forth the deeds. I am making the objection that the deeds set up in the petition only purport to convey an easement and not a fee.

The Court: It will be heard, subject to the objection.

Witness continues—

I have caused a survey to be made showing the oil wells now in course of operation, or in the course of drilling, in close proximity to the right of way of the Missouri-Illinois Railroad, in Section 20 referred to. The blue print Exhibit "B" which shows the right of way and the distance of the wells from the right of way is marked Exhibit "B" and offered in evidence, a copy of the said blue print being as follows:

(Here follows one photolithograph, side folio 123.)

H. T. Sweeney – Fee 59 Ac.

Harry F. Corbin – Lse.

B. F.

Ohio O

Nannie Wallis

250

255+19 - 18" C.I.P.

247+86 Public Xing

247+86.5

11st

236+66 - Whistle Post
236+19 - Xing Sign

235+39 - Public Xing

234+76 - 18" Corr. I. Pipe

233+31 - Fc

230

P.T. 227+24.6

D = 1°00
Δ = 3°0

23°54'

R.R. Prop. Fc - 32.5'

R.R. Property

Fence 32.5'

65°06'

247+75 - Xing Sign.
247+68 - 12" Wt. Pipe.
247+38 - Whistle Post.

240

238+23

Rusler

N

e Wallis – Fee

Mrs. Matthew Young – Fee

Ohio Oil Co. – Lse.

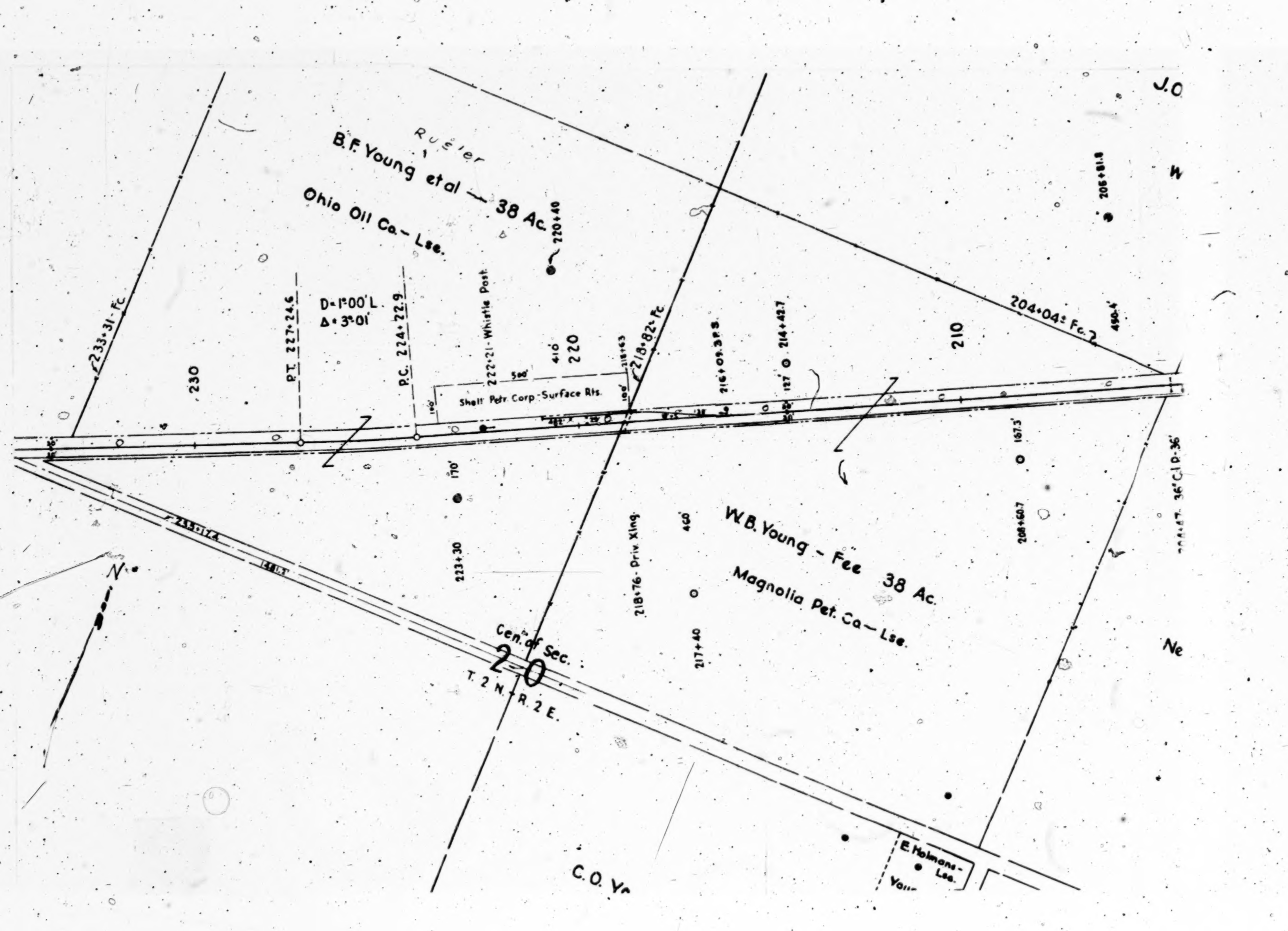

B.F. Young et al — 38 Ac.
Ohio Oil Co. - Lse.
Ruesler
D-1°00' L.
Δ-3°01'
P.T. 227+24.6
P.C. 224+22.9
233+31 Fc.
230
222+21 - Whistle Post
220+40
410'
220
218+82± Fc.
218+63
58'
100'
Shell Pet. Corp. - Surface Rts.
216+09.3±S.
214+42.7
127'
204+04± Fc.
210
206+81.8
490.4'
167.3'
170'
223+30
218+76 - Priv. Xing
460'
217+40
W.B. Young - Fee 38 Ac.
Magnolia Pet. Co. — Lse.
208+60.7
Cen. of Sec. 20
T. 2 N. - R. 2 E.
E. Holmans - Lse.
N
Ne
J.O
W

EXHIBIT B.

J.O. Shanafelt — Fee 78 Ac.

W.B. Bell — Lse.

T 2 N.

17 20 16 21

R 2 E.

204+47- Fc.

204+04± Fc.

210

200

190

205+81.8

199+99.4

191+10

193+84 Priv. Xing

193+36 R.Sw.

190+50 · Station Sign

189+79 End of Spur

662'

435'

450.4'

150.4'

127' @ 214+42.7

167.3'

208+60.7

204+47- 36' C.I.P.-S.

204+17 P.S.

205+65- Whistle Post.

193+89.4

194.6'

189+44.0

189+28

458.7'

187+97.7

185+34

63° 24'

R.R. Proper

L. Magnolia Petr. Co.

SELMAVILLE

Xing Sign

Young — Fee 38 Ac.

Magnolia Pet. Co — Lse.

E. Holmans — Lse.

Voir

Rusler.

Nellie Young Searle — Fee 40 Ac.

C.D. Ham — Lse.

D.W. Voi..

EXHIBIT B.

104A

T 2 N.

17 20 16 21

R 2 E.

1C.

193+84 Priv. Xing

193+36 R Sw.

191+10

435'

190+50 Station Sign

190

189+79 End of Spur

6812'

180

181+25 P.S.

R.R. Property Fc. 32'7

R.R. Pro

L. Magnolia Petr. Co.

63° 24'

193+89.4

186.6'

189+28

458.7'

185+34

184+42

Xing Sign - 18

187+97.7

Priv. Xing - 184

189'44.0"

SELMAVILLE

e, 40 Ac.

D.W. Yo.

123

[fols. 124-125] Examining Exhibit "B" the distance of each well in this particular section from the center of the Missouri-Illinois right of way is as follows: beginning at the east side of Section 20, the first well on the north side of the track is located 156.6 feet from the center line of the right of way; the second well adjacent to the track on the north side is 167.3 feet from the center of the right of way; the third well on the north side is 460 feet from the center line of the right of way. Beginning from the same side of the section the first well on the south side of the track is 435 feet from the center line of the right of way; the second well is 150.4 feet from the center line of the right of way; the third well is 450.4 feet from the center line of the track; the fifth well is 127 feet from the center line of the track; and the sixth well is 410 feet from the center line of the track. These distances are measured distances.

Mr. Railey: I desire to call attention of the Court to the manner in which this proposed contract with the Blackstock Oil Company is drawn. It is in three parts: The first part provides the manner in which he shall be paid pending this litigation, and is virtually on a cost-plus basis.

The second part embodies the lease provisions, which will be retroactive and supersede Part 1 in the event our title is upheld.

Part 3 is a provision agreeing to submit any controversy to this Court if our title is upheld in part and refuted in part.

Obviously, therefore, the gentlemen who are appearing here in behalf of these Oil Companies are not concerned with Part 2 or Part 3 of this contract, which have to do with the oil lease, because that will become effective only in the event our title is upheld. They are, however, somewhat concerned with Part 1, Article 1, of the Contract, which provides for the payment to be made to the Blackstock Oil Company pending this litigation, and which has to be paid out of the proceeds of the oil removed from their property.

I, therefore, think it advisable to have Mr. Bates explain to the Court in a little more detail the manner in which that cost is figured, and before doing so I ask leave to file with [fol. 126] the Court—and the Court's approval of—a slight amendment in the terms of the contract, that portion of the contract attached to the petition as Exhibit "A". These have resulted from some additional saving.

The changes that are proppsed are as follows:

In paragraph (o), Article I of the contract, the first item is "Cost of each well completed during such calendar month."

In this document on Page 8961 of the Printed Record purporting to be this contract, you will find the first item:

"(1) a. Price per foot depth of well $3.25

To make clear to all concerned what is included in that $3.25, I have in tlis amendment included some additional items in parentheses, so that it now reads as follows:

"a. Price per foot depth of well (including therein the following items: Service of geologist, Schlumberger survey, steel housing for well, changes in railroad facilities, casing fittings consisting of master valve, floatshoe, Hinderliter head, and surface rights on adjoining property) $3.25".

That was, of course, understood between the contracting parties, but it was not understood by some of the parties who examined the contract and felt that the $3.25 was somewhat excessive for the mere drilling and nothing else.

Item (1) f., that appears at the bottom of Page 8961, is "10 per cent for accounting and supervision."

Mr. Blackstock has agreed, at our insistence, to reduce that to "5 per cent for accounting and supervision.

On Page 8962, under Item (2) c, appears: -15¢ per barrel on all oil produced for all other operating costs of production."

That was intended to cover some speculative cost that Mr. Bates was anxious to have reduced to a definite figure, but, because of some criticism of that item by others concerned, Mr. Bates has deemed it advisable to put that back on a cost basis, even though it is somewhat more difficult to police the cost than if it were a definite figure. [fol. 127] Accordingly, "Operating cost of producing oil after drilling is completed," has been changed as follows:

Paragraph a. has been changed so as to provide $25.00 per month, as now set forth, for the first five wells, and it reduces that to $15.00 per month for the accounting expenses on subsequent wells, a saving of ten dollars per well per month for all wells over five.

Item b. has had the words added: "and all other materials and supplies for production and saving of oil."

There has been another item c., added as follows:

"All of the labor cost for production and saving of oil."

Then there is Item d.: "5% of items b and c for supervision."

In other words, that has been changed from a definite provision of 15¢ per barrel to a cost-plus basis to correspond with the other figures.

With respect [fo] subdivision (3) on Page 8962, relating to the cost of gathering and marketing of the oil, in line a., the actual cost, plus ten per cent., as it originally read, has not been changed to actual cost, plus five per cent., for supervision, as it were, and in item c., there has been added with 5 per cent thereon for supervision."

These are advantages to the trust estate and are likewise advantageous to anyone who is interested in the oil out of which these expenses are paid.

F. E. Bates recalled:

Mr. Railey's statement about the amendment to the contract attached to the petition is correct.

My experience as an engineer and my experience in handling oil matters for the Missouri Pacific has given me an opportunity to make a rather thorough investigation of this class of costs. I have made a thorough canvass of the situation. The cost of drilling wells, that is, the cost of drilling that drillers are charging in this field is from $2.75 to $3.50 a foot. Other items of probable expense are quoting the item shown in the amendment No. 1167, services of geologist are estimated at $100.00; Schlumberger [fol. 128] survey, at $125.00; housing for the well, requirements under the lease $225.00; changes in railroad facilities, $50.00; master valve, $185.00; floatshoe, $51.00; Hinderliter head, $125.00; surface rights on adjoining property $250.00, or a total of $5,850.00 for a well 1800 feet deep.

If the driller were obliged to absorb out of the $3.25 per foot on an 1800 foot well, all of those items, or possible items of the expense above named, that would leave $2.63 per foot for actual drilling.

With respect to the charge of 5% for accounting and supervision as opposed to 10%, that was a matter of negotiation between myself and Mr. Blackstock after can-

vassing the situation and after discussing it with other parties who are expert in these matters. That change was made because we felt that 5% was nearer a reasonable figure.

With respect to the 15-cent per barrel under the second subdivision, relating to cost of producing oil, we changed from 15-cents a barrel to a cost-plus basis for two reasons: Mr. Blackstock preferred such an arrangement on account of the uncertainty of marketing his oil; secondly, it would reduce that cost to actual cost rather than a unit cost that might be excessive, providing he could market the full production capacity of the well.

I consider these figures reasonable as finally agreed upon from the best information that I obtained from my conversations with experts and with persons who represent major oil companies.

Cross-examination.

By Mr. Van Meter:

I have had supervision of the matters on the Missouri Pacific since June. This information, as far as drilling cost, is based on bids furnished me by independent drilling contractors, in this particular field and in the Centralia field. In the Centralia field, the last wells drilled on our property were in September of this year.

Under Item a., of (1), drilling and equipment cost, it states that part of that cost is surface rights on adjoining property. Our right of way is of such width that an in- [fol. 129] dependent driller should, if possible, secure surface rights on adjoining property; it is a matter of economy. To my knowledge, we have not obtained surface rights. I do not know whether we can obtain them.

The item of 10%, in a., under (3), for the installation, maintenance, and operation facilities, has been reduced to 5% for accounting and supervision; that covers overhead of the contractor and general office expenses and any profit that he may make on this well.

There is an item c., under (3), actual cost of sales organization necessary to dispose of the oil up to a maximum of $500.00 per month. That is for disposing of the oil. The contractor is going to dispose of the oil.

Mr. Railey: That is a maximum limit but not fixed charge.

The Court: Actual cost up to the maximum; if it goes over $500.00, he gets no more?

Mr. Railey: Unless with our consent; the method of payment is set forth in the contract; at Page 8961 it reads as follows:

"For all operations, services, costs and expenses incurred or assumed by Contractor in or in connection with Contractor's performance of Contractor's undertakings as in this Article 1 expressed and set forth, during each calendar month."

Mr. Railey: A little further on, in relating to the obligations of the Trustee, it provides that it guarantees these payments under Part 1, but not under Part 2; that is, it is paid out of the oil in so far as possible, but if the oil is not sufficient to pay the costs under Part 1, the trust estate will have to bear the difference.

Mr. Van Meter: As I understand it, then, it all comes out of oil, all of these payments, except that part under Part 1, if the oil is not sufficient the Trustee pays it?

Mr. Railey: That is correct.

[fol. 130] Mr. Van Meter: But the whole theory is that all this cost comes out of the oil produced?

Mr. Railey: In so far as possible.

The Witness: There are approximately 8 acres of land in this right of way across section 20. It is proposed to drill 8 Benoist wells on that 8 acres, plus such additional wells to protect the property against offsets. There is a further provision that under certain circumstances, he is to drill 7 more Benoist wells, that would make 15 Benoist wells, and that is the maximum. The contractor is to drill to the McCloskey formation five wells for the development of the property. In addition to those 5 wells, there is a further provision in the contract that he is to drill 4 additional McCloskey wells if it is necessary to protect against offset wells. That would make a maximum of 24 wells on those 8 acres. I do not know that any of these present wells adjoining the right of way were drilled to the McCloskey at present. The McCloskey is at a depth of about 2,000 feet, the Benoist is about 1800 feet. The amount of oil that we will secure from the right of way is dependent to a certain extent on the amount of offsets on either side. We anticipate a recovery somewhere between three and

four hundred thousand barrels of oil from the 8 acres of right of way. The production per acre is estimated in that field at from ten to twelve thousand barrels to the acre. I couldn't tell whether to get three or four hundred thousand barrels, that oil would come out from adjoining premises other than the 8 acres of right of way.

The estimate that I gave with reference to oil to be recovered from the right of way is from the two sands; the estimate in the Benoist sand is ten or twelve thousand barrels per acre; it is rather skeptical what the recovery will be from the McCloskey per acre, there has been runs on it, but there has not been sufficient production to estimate. It couldn't be approximated.

We set up a certain figure here as to the cost that Mr. Blackstock is to be paid out of oil from these various wells. The actual cost of the well is approximately $12,200.00.

Q. Therefore, if you get a total of 300,000 barrels of oil, wouldn't practically all of that money be paid to Blackstock, under this contract, out of the oil?

[fol. 131] A. On the basis of eight wells?

Q. No, on the basis of twenty-four wells.

A. I don't know that we will drill the twenty-four wells.

The Contract says he must do that if I require it.

We are asking that this contract be approved at this time. He will drill 8 wells to the Benoist unless adjacent leases drill other wells offsetting our property. We have to protect ourselves against offsets, and we can require him to drill those additional 7 wells. If we have to be protected against offsets we can require him to drill up to nine McCloskey. It depends upon the recovery that we got. Whether if he drills 24 wells that would exhaust this oil money from all of the oil, the amount of oil is speculative that we will get out of these wells. If we drill 24 wells we would, undoubtedly, get more production than I figure. How much more, what I could give would simply be a guess. I couldn't very well tell you whether the production that we would get, that 300,000 barrels from the two sands that I say this 8 acres would produce, would come all from this 8 acres, or whether it would come from under adjoining lands along the right of way. There is a certain amount of drainage to each well, certainly.

The application here for approval of this contract is a matter of protection to the Trustee in this case against loss

of his oil that might be under this railroad right of way if he owns it.

We anticipate that the Trustee is going to drill 8 wells on 8 acres on this right of way to the Benoist sand; that is the calculated plan without reference to offsets. The recovery would be approximately ten or twelve thousand barrels per acre from the 8 acres. The drilling cost that the Trustee guarantees to pay in oil, if the production is sufficient, of 8 wells, would be in the neighborhood of $96,000.00. The posted price of oil produced in that field, the last I heard was $1.15. I think the production from the wells will exceed twelve thousand barrels. It is necessary for our production to be in excess of twelve thousand barrels per well, to make it profitable. If that is the production per acre, in order to make it profitable, then, if the recovery per acre from the railroad right of way is twelve thousand barrels, you must get oil from adjoining lands rather than [fol.132] from the railroad right of way. It is up to the owners of adjoining lands whether they protect themselves against drainage from land other than the right of way and drill offset wells.

The location of the wells to be drilled on the right of way has not been determined yet.

The twelve thousand dollars cost of completing a well covers a completed well with necessary facilities for the producing of oil. Necessary facilities would include your well proper, it would include housing for the well, it would include the preparation and installation of roads to get to and service the well, it would include the well head and fittings, flow tank, and oil and gas separator. The well would not be ready to produce without that equipment.

DORSEY HAGER, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Trustee as follows:

Direct Examination.

By Mr. Railey:

My name is Dorsey Hager. I am a consulting geologist, petroleum engineer. I am not employed in any other capacity by Mr. Thompson, as Trustee, for any of the Missouri

Pacific properties aside from my capactiy here today as an expert witness for the Trustee of the Missouri-Illinois Railroad Company. I am here solely as an expert to testify in this case.

I am the author of this work "Practical Oil Geology." I am the author of other works. I have had 28 years of experience in the oil business. I took my preliminary engineering work at Washington University, St. Louis, and at Columbia University, New York. From there, I went to California in 1910 and worked for the Southern Pacific, or the Oil Department of the Southern Pacific Oil Company, three years. I started in the field roughnecking, doing manual labor, and finally took charge of the property as its wells foreman. Later, I went into engineering, working for myself. I have been in that capacity almost continuously, with one exception when I managed a property for an Oil Company.

[fol. 133] I have prepared a contour map of the so-called Salem field, through which this right of way in Section 20 runs, and I have advised my clients about the purchasing of royalties and properties in and around the field; since the field has developed, I lived in Centralia, and have been associated with matters in that particular field; that was along in the spring of this year.

It depends upon the location of the wells in the field as to how deep it is necessary to drill to reach the first oil deposit in this field. There are two, and in some cases, three proven zones, or fields, also called horizons. Two of them are, the Benoist sandstone, and the McCloskey limestone. There is a structure or dome which you would term a common reservoir in this sandstone that I refer to as Benoist field, in which this deposit of oil is situated. The area outlines would run from six to eight thousand acres. The limits have not been clearly defined. The right of way of the Missouri-Illinois Railroad crosses that reservoir, or field, north of it.

I heard Mr. Bates' testimony regarding the proximity of oil wells now in operation in the vicinity of the Missouri-Illinois Railroad Company, in Section 20, and have examined Exhibit "B" setting forth those lines. In my opinion, those wells in that location will, in all probability, drain more or less of the oil from under the Missouri-Illinois right of way unless wells are sunk without delay on the right of way to conserve the oil thereunder. I would say there would be a material disadvantage if the wells are

drilled later. The pressure will be dissipated, and production of late wells would be far less than earlier wells. The experience of Mid-Continent, where wells are brought in without control the ultimate production of a well is generally placed from two and a half to three and a half times the first year's production. In other words, if they produce ten thousand barrels a year the first year, the ultimate production will be twenty-five thousand to thirty-five thousand barrels of the total ultimate production. That is all of the oil produced. In other words, you will produce anywhere from probably forty, and in some cases as high as fifty per cent of the oil the first year; other times, you will only produce one-third.

[fol. 134] In my opinion it is greatly to the advantage of this Trust Estate that wells be sunk as early as possible, while the pressure of the gas on the oil is there and before any of this oil is drained in large quantities to wells on adjacent properties.

From my experience, it has been that the first wells drilled get the oil and there must be channels formed, at least later wells drilled around them very seldom approximate the size of the first wells, if drilled considerably later.

Cross-examination:

I am familiar with the field and the wells that have been drilled. These immediate wells, I am not, except from the map. In driving through, I have seen the wells in Section 20, Township 2, that is all. I don't know all of the details of the initial production of those wells. I don't know how these wells are being produced, except the ordinary handling in the field. If the wells were on limited proration, if the wells were shut down, there would certainly be no drainage. If the wells were not limited proration, there would certainly be some drainage. It depends upon how long that continues. Some of these wells are 150 feet, or 125 feet away. We generally agree in the oil country, that wells that close will affect adjoining property. I don't know whether that 50 barrels a day, being the pipe line proration, that is 1500 barrels a month, which is a good deal of oil,—that oil will be draining from quite an area. It may come immediately under this property. We can't tell where it comes from. I don't know with 50 barrels a day limitation that there would be drainage of wells beyond the accepted prac-

tice in that field down there, 660 feet. If I owned adjoining property, as an independent operator, I would certainly immediately force, in 30 days time I would immediately force anyone that had my lease to pull an offset well to protect me. 10 acre spacing is the accepted practice in that field, that puts 660 feet between wells. That is the generally accepted practice in that field. Wells are not drilled there except where offsets are forced, at closer distances than that.

Q. In your opinion as a geologist, would you say that if those wells were limited production of not to exceed fifty [fol. 135] barrels a day, that wells that are farther away than 330 feet would have any likelihood of early drainage?

A. If the oil comes from the top of the sand, it depends on where the channels are formed, and how that oil comes in. That is a question I can't answer, I wouldn't take any chances in operating, if I were a landowner, I would not let anyone drill an offset well without forcing production.

It is general practice in the oil country to offset the same distance, that is if you put a well 330 feet from the line, the other man then generally places his well 330 feet. It is not established that where the 330 feet placing is used, that two wells placed 660 feet apart will drain all of th oil of wells in between. In some areas, the practice is one well in 5 acres, or one to 8, 5 to 40 acres. It depends upon the producing horizon and conditions. The accepted practice by all of the Companies operating in the Salem field, is on a 10 acre basis. If they could get it one to 20, they prefer 1 to 20.

As to the Salem field, as to whether the pressure that is furnished for the uplift of the oil is water, or gas, I am not familiar. We know the wells around the edge of the field have shown water and there is not a great deal of gas in any of the fields in western Illinois. So, I would assume there is a water drive. It is too early, probably, to establish a water drive. Any loss of gas or any pulling of oil from the top of the structure would allow the water to encroach on the sides, would allow the water to come from the sides and encroach or drive in on the wells. If you pull too fast, you would pull the oil out faster than the water pressure. The situation would be aided by the drilling of a large number of wells. The larger number of wells you drilled, the sooner that thing would happen.

Mr. Counsel, in any field we know from past experience, and that is all we have to go on, this is a new field, that where you have wells placed that close together there is drainage. You would have to have a gauge in the field to see what the effect is of one well on the other; you would have to have a gauge in pulling, and those measurements have not been made. I would say there would probably be a substantial drainage in six months. If they were held to 50 barrels, that would be 1500 a month. In six months, [fol. 136] that would be nine thousand (9,000) barrels. There would probably be some drainage that close. Some of those wells are 167 feet, one here is 127 feet and the other 154 feet. With the wells 330, or more, feet, I would say that the drainage would be far slower than those closer. There might be some drainage, that is something that I can't tell.

Mr. Railey: I believe that is all of the testimony we care to offer at this time, your Honor.

Mr. Van Meter: There are certain legal questions we wish to raise as to matters in the petition, but I assume your Honor wants us to raise them after the conclusion of the evidence.

And, Thereupon, the Defendants, to maintain the issues in their behalves, offered the following evidence:

C. J. Hares, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

Direct examination.

By Mr. Van Meter:

My name is C. J. Hares. I live at Marshall, Illinois. I have been geologist for The Ohio Oil Company for twenty-one years. I have not acted as geologist for any other Company. My duties as geologist are varied; one of the main duties is that of acquisition of possible oil land. Also, the selection of drilling sites for wells. I have had practical experience along those lines during all of the time that I have been employed by this Company.

I am familiar with the premises described as the south-east quarter of the northwest quarter of section 20, and

the northwest quarter of the southwest quarter of the said section 20, in township 2 North, Range 2 East of the Third Principal Meridian, Marion County, Illinois. The Ohio Oil Company has oil and gas leases covering both of those tracts from the landower. Those oil and gas leases do not except the right of way of the Missouri-Illinois Railroad Company. I have been on those premises and examined the situation there with reference to the location of wells now existing on those premises. I was [fol. 137] there this past summer. I know the location of the wells there. I know where The Ohio wells are there located with reference to this right of way. One of them is in the neighborhood of 149 feet, and the other about 410 feet from the right of way according to the measurements. There are no other wells for The Ohio Oil Company less than 400 feet from the right of way.

I am reasonably familiar with the structure there, the sands that exist in that locality. The Ohio Oil Company is producing from the Benoist sand at this time. There is no production there by The Ohio Oil Company from any other sand. At the present time any drainage from under the right of way is inappreciable. Oil is being taken from these wells at the rate of 50 barrels a day. That is the pipe line proration,—50 barrels, per well, per day.

I am not in a position to testify as to whether The Ohio Oil Company has delivered any oil to the pipe line from the two wells hereinabove talked about.

It would take several months, if these wells were continued to operate as they are now, before there would be any drainage of oil from under the right of way to either of those wells. There would be no drainage in my opinion from the well that is 400 feet out from the right of way. As to the well that is about 149 feet from the right of way, the drainage would not occur from that well until several months from now.

The proration that I have testified about is based upon the Rules and Regulations of the Pipe Line.

I believe this field is a water-drive field. In that kind of field the drilling of 24 wells on an 8 acre strip is too many wells for the strip. The effect of that would be to take more oil out of those wells than they are entitled to. It possibly would shorten the life of the field, or the recovery of oil. It would tend to cause the water to encroach.

Basing my opinion on both the Benoist and McCloskey sands, the ultimate recovery per acre in this field would be about 10,000 barrels of oil per acre. In my opinion, the recovery from the Benoist would be in the neighborhood of 3,700 barrels, possible 4,000 barrels, per acre, and the [fol. 138] difference between that and 10,000 barrels would be the recovery per acre from the McCloskey. I am basing those estimates on a completed field nearby where this same sand is produced and the wells are being pulled out. This field is about 10 miles away. The field has produced in the neighborhood of 3750 barrels per acre out of this same sand. The field that I refer to is about 10 miles away, it is the Sandoval field. It has been in operation close to 30 years to recover 3,700 barrels per acre.

Cross-examination.

By Mr. Railey:

I do not know what the production in that field was during the first year. I do not know what proportion of the oil was taken out the first year with reference to this field that has been in operation for 30 years. I would not as an expert estimate that it was probably approximately one-third. It would roughly have been under the same conditions thirty years ago, as it is now.

In my opinion, a well in this Benoist sand in the field in question would drain only inappreciably, at least, at a distance of 410 feet. That would be true throughout the life time of the well. An oil company would not, under those circumstances, sink an offset of a well 410 feet distant. We are not sinking offsets if the well is less than 630 feet. The purpose of the 660 feet rule is so that there will be one well in all 10 acres. They are spacing wells at about a distance of about 660 feet throughout the basin, except where one of these little acre tracts is being drilled to force more wells. I also stated that at the present time I didn't believe that a well 149 feet from the right of way was drawing any appreciable amount of oil from the right of way. We know we have only taken just a little oil out of the well so far; nothing to mention coming from the right of way. One well has been only producing since October 30th, which makes about 50 barrels a day, and it has not been producing every one of those days. The same way with the second well.

That would be only about 450 barrels out of each well if it had produced every day the full amount.

I could not venture an opinion as to whether our Company would be willing to shut down and not operate any [fol. 139] wells within 500 feet of the right of way pending the determination of this title.

(After Noon Recess.)

I have no different answer than the one previous with reference to whether or not my Company would be willing to shut down any wells within 500 feet of the right of way pending the final determination of the title in this proceeding. I would not want to venture an opinion on that.

I refer[illegible] in my testimony to the Lake Centralia and Sandoval fields. The Lake Centralia field is the same as the Salem field. I did not refer to the Centralia Pool in my testimony this morning. I am not familiar with the Centralia Pool.

The Benoist sand in the Salem field is about 1800 feet. As to the thickness of the sand, it might be as much as 35 feet, probably including some shale with it. It might be at least 60 feet in some locations. I know the thickness of the Benoist sand in Section 20 where the wells that are fairly near the Missouri-Illinois right of way are located, in our Young Farm wells it is 35 feet, 28 feet, 40 feet and 36 feet. In our wells on these Young Farms it varies from 28 feet to 40 feet. By that I mean a 40 acre tract that my Company owns or leases through which this Missouri-Illinois right of way passes. That is the location I referred to. It is the Young Farms that the Railroad passes across. We have a minimum in the wells drilled of 28 feet to a maximum of 40 feet, that is the Benoist sand. We do not have any wells to the McCloskey in that territory.

I do not know in detail the thickness of the producing sand in the Sandoval district. It is, I presume, about the same being only 10 miles distant. I do not know for sure that the thickness is only from 15 to 25 feet, but since the two fields are so close together I would assume that the sands are about the same thickness. We know what it is per acre in the Sandoval field and that is a fair measuring stick for this one.

I do not have any knowledge at all of the production in the Centralia field. We have no leases as a Company in [fol. 140] the Centralia field. The Salem field is considered

one of the better fields that have been found in the State of Illinois. Perhaps the Beecher City Loudon field is in a class with this one. That is about 30 miles away. The Salem field is one of the best around the new pools, new fields.

If well informed oil men are estimating that there may likely be a production in the Salem field of from 40,000 to 50,000 barrels per acre, they are away too high. It is not my opinion that there will be that much. It might be true that many well informed oil specialists are making such estimates, but I am not advised on that subject.

If in this particular territory in Section 20 there was a well which had an initial production of 200 barrels of oil per day, if that well was 330 feet from our lines we would offset it. We try to use a little common sense with these locations, and make them fit a 10 acre pattern, that is best oil field practice. That is the pattern that it is laid out by, more or less. A 200 barrel well would offset oil territory as far as 400 feet away. We would probably offset a well of that size 400 feet away. It is correct that I think that would be good business judgment as an oil man.

The last time I saw the wells of my Company in Section 20 was in the neighborhood of 10 days ago. From the Company records, I know the amount has been 50 barrels of oil per day taken out of each of the wells of my Company in Section 20; one well has been in 5 days, and has made 450 barrels, and the other had made 100, according to our records. That is control production. The initial production on one of them was 135 barrels without control, so that would be about the maximum that we would expect to get if you produced your capacity. A 135 barrel well is a nice little well. In my opinion it would draw oil at least from 330 feet. Most of the oil would first come from right around the well itself. It would draw a few gallons of oil as far as 330 feet. If it did draw a few barrels, that is merely negligible. We might be forced by the land owner to drill an offset. We found it necessary to offset commercial wells and if my client owned lands within 400 feet, I believe, if [fol. 141] there was a well producing approximately 200 barrels per day, I would advise sinking an offset well to conserve his oil. We don't do that for the fun of drilling a well. We feel that there is better territory back a way from that distance, and if we do not offset the well that is drilled, we may have the lease cancelled. If I owned the

property myself in my own right, I would probably drill the well.

The Court: Why would you do that if it would not drain more than a few gallons, or a few barrels?

The Witness: It takes a long time; it takes these wells in the neighborhood of 20 to 30 years to get all of this oil. You can not get it all in one day or one month or one year.

As a guess, the approximate amount of oil that would be taken of a well the first year, as compared to its total production, might be at least one-third. As to these two wells near the right of way and on The Ohio Oil Company's leases, we had one of them to go on one day 135 barrels, that was 24 hour production. Since then they have been prorated. That is the south one. There is no reason to think that the north one is any larger, that was the well nearest to the right of way. The south well is nearest.

Redirect examination.

By Mr. Van Meter:

If a well is drilled on that right of way, this 60 foot strip, that would require in the way of offsets on adjoining premises the drilling of two wells, one on either side of the railroad, both the north and south sides.

Recross-examination.

By Mr. Bailey:

Ordinarily they offset them right up to the line, using 30 foot for the person that drills on the right of way, because they have to stay away from the ties: that leaves them about 20 feet, so, his hole is going to be in the neighborhood of 10 feet from our line, and that is where our hole would be, also.

[fol. 142] D. V. Carter, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

Direct examination.

By Mr. Van Meter:

My name is D. V. Carter. I live in Dallas, Texas, have lived there approximately 5 years; I am Chief Petroleum

Engineer of the Magnolia Petroleum Company. I make frequent trips regarding producing, technique, equipment and so forth, in various states where our properties are located, including Illinois. Our Company has about 7500 producing wells. I have had experience with those various oil wells. I have been a Petroleum Engineer for approximately 13 years.

The Magnolia Petroleum Company has an Oil and Gas Lease from the landowners covering the southwest quarter of the northeast quarter of section 20, township 2 north, range 2 east of the Third Principal Meridian.

Mr. Bailey: May it please the Court, for the purpose of this summary proceeding, it is agreeable that these gentlemen may offer their title in this manner.

Mr. Van Meter: I have certified copies of the lease, but I understood Mr. Bailey that it was all right in this preliminary proceeding, to make the proof in this manner. If there is any question, I can offer these certified copies.

Mr. Bailey: That is all right. It is satisfactory also to make the proof as to the leases of the Ohio Oil Company by the parol testimony, as has been done heretofore. There are two Leases covering The Ohio Oil Company property involved in Section 20.

The Witness: I have been down on this property described as the southwest quarter of the northeast quarter of section 20. I was down there yesterday afternoon about three o'clock. I had been in the field before. I had not been on that particular Lease before, because the first well is only three or four weeks old. I have been in the Salem field before. I have information of the surface condition, and general characteristics of the sand in the field, so far as we have been able to determine it up to this time. [fol. 143] We have two wells in the extreme close proximity of the railroad right of way, that is within several hundred feet, we have 2 wells, number 5 and 6. Number 6, W. B. Young, is north of the railroad. Number 5, W. B. Young, is south of the railroad. Our Number 6 well, according to the Missouri Pacific map, is 127 feet north of the center of the right of way. The Magnolia Company's Number 5 Well is 167.3 feet perpendicular line in a southerly direction from the center of the right of way. On this 40 acres we have producing wells No. 2, No. 3 and No. 1. No. 2 Well is regular location as I recall, 330 feet, or 533

feet from the right of way. The other two wells are a greater distance from the right of way; I would say in excess of 700 feet. Wells Numbers 5 and 6 are possibly not over two weeks old. They are at present connected with the pipe line. I understand that they are on pipe line proration of 50 barrels a day. At the present time, in my opinion, from these Wells Numbers 5 and 6 there is very little draining affecting the Missouri Pacific right of way. The basis of my opinion is, looking at the entire Salem field as being a common reservoir and in a given horizon with particular reference to the Benoist sand, the source of energy is the water-drive in the Benoist sand and any Lease favorably situated on structure, that is for example in Section 20, whether it is in Ohio, Magnolia, or Missouri Pacific right of way, a barrel of oil drawn at a low rate of flow, but under reasonable proration is, for the most part, particularly in the early stages, replaced from the oil that is driven into it, due to this water-drive. In time, as the production of the wells declines, the daily production, in years to come, there would be drainage on the Missouri Pacific right of way. The time that drainage will occur in appreciable quantities will depend upon the density, well acre density, the field is drilled to. If the field was uniformly laid out, with no small tracts, and was drilled one well to 10 acres, and reasonable proration was used in order to conserve the water energy and not create prematurely a low pressure area, then the oil would be driven up the depth from the edge of the field, subsurfacely speaking, toward the center of the field. The effect upon the field of too much drilling, like 24 wells to an 8 acre strip, it is too many wells. It depends upon the character of operator. You can't always make a blanket statement; [fol. 144] that, more or less, is always bad practice from the standpoint of drilling into water, because, if extreme care was used and the physical characteristic of the sand was such that we had an easy field to operate, there would be little chance of waste, but there is a tendency in the case of a field, like the Salem field, where there is no proration, other than pipe line, and more than one sales outlet or crude oil producing agent, one Company ships a tank car and then two or three pipe line companies producing, a man that had an independent outlet could produce three times the amount of oil per day. We will say, the wells produced three times more than the offset connected to

the pipe line, then the well producing the most oil, and at an excessive rate, more than the well could properly stand, will result in water coning—water coning is premature water encroachment, and that is controlled by two principal factors, the depth of the amount of penetration of wells drilled, and, second, the rate of flow. In other words, if you open it to the entire capacity of the well. Premature water coning, that is an attempt to get all the oil as quick as you can, is usually what results in blocking off; in other words, the water cuts off the oil, or the gas slips off the oil. There would be a combination, in this case, without recovering its just amount of oil or its proper share of oil.

For each well drilled on the right of way of the Missouri Pacific, that would require one well north of the right of way and one well south of the right of way, which would be classed as direct offsets, and they would be drilled in equal distance from the property line.

It is not difficult if the usual precautions in drilling are exercised by the Contractor, or the man in charge, to keep the well on a particular strip at the bottom of the well. It is the tendency of all wells, particularly rotary drilled holes, to slope slightly. The deeper the well, the more power is given to that slope. Wells in the Gulf Coast are drilled ten or twelve thousand feet deep. Certain Companies require a limit of five degrees off vertical. Those are deeper wells. Certain Companies require as low as three degrees as a maximum of departure from vertical. Drilling within 30 feet of a property line, I have just forgotten the exact figures, but I believe you have to hold it [fol. 145] down to one degree or it might be two, or you would get off of the 30 foot strip at the bottom of the hole.

There are two sands that are capable of producing, and a recognized possibility of a third,—they are the Benoist, Aux Vaux and the McCloskey.

I would rather express an opinion as to the average recovery, not from the standpoint of barrels per acre, but from the standpoint of acre feet. I think, offhand, without going into a lot of detailed calculation, 200 barrels per acre foot of the Benoist sand would be a reasonable assumption at the present time. That means that if you have a thickness of ten feet of sand you could recover 2000 barrels of oil. If you have 40 feet of sand, that would be 8,000 barrels. I would like to check that on the chart here

a little bit closer. It would take a little bit higher than 200, I would say that would be in the neighborhood of 225 barrels per acre foot. Yes, that is assuming 90% saturation, 40% recovery, and not allowing them any shrinkage factor. 40% recovery of all oil in place would be commercial recovery, that is, would be extracted and sold. That is an assumption. If the water-drive has a high efficiency, it might be as high as 70%, and we could raise it accordingly. If the fields are not subject to a natural drive or in the late stages of life, an artificial life created by further drilling and water flooding, the recovery may run 20%. In this case, without making any laboratory tests, I don't believe there is any great amount of free gas. It is probably all in solution, just like carbonic acid acts in solution in Coca-Cola.

In my opinion, at the present time there is no appreciable amount of drainage from these two wells under the restriction of 50 barrels per well. It would become more appreciable at the time the wells have no potential above their daily allowable. Now, some of those wells can produce three to five hundred barrels per day, and they are taking 50 barrels, and when they reach the time when they can't make over 50 barrels per day throughout 24 hours, then drainage becomes increasingly important.

[fol. 146] Cross-examination.

By Mr. Dearmont:

The initial production of our No. 6 Well was flowing 360 barrels in 24 hours; No. 5 well flowed 288 barrels the first day; No. 2 well 300 barrels the first 24 hours; all of these wells are Benoist sand wells; No. 1 averaged about 20 barrels per hour on the 24 hour test; No. 3 was 336 barrels for the 24 hours. These are all Benoist sand wells. We have not, to my knowledge, hit any water in the lower part of this Benoist sand in drilling the Wells Numbers 2, 5, and 6.

It is my opinion that the closure on the structure is in the neighborhood of 180 feet, and, for the sake of argument and illustration, I will say the Benoist is 40 feet, and the area where Section 20 is located, as regards structure, I don't suppose there would be any water in Benoist in that immediate area; however, on the edge of the field, the rate of withdrawal affects whether or not there is

water encroachment. There is not a lag, the water encroachment keeping up with the oil withdrawal.

The west one-half of the east one-half, section 20, is, you might say, quite desirable from a structure standpoint. Although you would have water encroachment there, it would not be so serious at the present time; the high rate of withdrawal due to an excessive number of wells drilled would have the effect of premature low pressure area being created. From the coning standpoint, right there, I couldn't say there would be an immediate danger of it. I know in East Texas a field of 130,000 acres approximately now has approximately 26,000 producing wells. Due to the nature of the land tracts, size, and shape, and due to the fact that it was before we had available proration laws and orders in the State of Texas, take the New London Townsite, in the middle of a field, where they have drilled an excessive number of wells, there is a tendency for that to occur. Just like a cancer, it continues to grow out and affect of that may be felt a half mile away. In Illinois there is no conservation law, and once you break that, there is a tendency for each operator to maintain an equal well acre densite for each tract.

I know Mr. Blackstock. Our Company had partnership property with him, and I believe I have met him. However, [fol. 147] I can't say I am a close friend. I think Mr. Blackstock is recognized as a drilling contractor,—as an oil operator, I couldn't say one way or the other; not to be prejudiced in this case, but I just lack knowledge; he is a drilling contractor, yes. I believe in the past he has drilled for our Company.

Our No. 6 Well is located within 127 feet of the center line of the railroad right of way, according to the Missouri Pacific map, that would mean that that Well is located 97 feet from the right of way line. That well had an actual production of 360 barrels a day. It is my opinion, that a well of that capacity, and located within 97 feet of the line of the railroad right of way, would drain no appreciable amount of oil from the right of way property at present, that is for several months, but, as time went on, in the later stages, maybe a year, two, or three years, it depends on what rate withdrawal is taken from the entire reservoir, there would be such drainage. There is no mandatory limitation on the amount of oil you can take. There

is an outlet limit by pipe line. [It] order to make an accurate estimate as to how much the drainage would be, you would have to give me the rate of withdrawal, and you would have to show me the locations of all offset wells to the strip and give me the time factor, and we would have to study the pressure decline in the reservoir by the use of an instrument.

Q. I can give you this, I can give you the fact that your well is located within 97 feet of our right of way. At the present time, after that well No. 6 has been going two weeks, or less, I will ask if it is not a fact that located 97 feet from that right of way which has no wells on it now, there is an actual drainage of oil, to some degree, from that right of way by that well?

A. It would be very, very negligible, in fact, we are forced to wait for lack of drilling tools, in a great many cases, for a longer time than that.

In answering that question, I am not taking into consideration the fact that the wells only flowed for about 10 or 12 days, but am considering fields where wells flowed 5, or 4, or 8 years. If it were located within 50 feet of the right of way there would still be negligible damage done [fol. 148] on account of the oil withdrawn from our producing well No. 6 being replenished both on the strip and our own lease from the whole field around it to a great extent, oil from the outermost portion of the field. If there was a well within 25 feet, the closer you get, it becomes increasingly more damage, whatever that damage is. I don't feel that a well within 50 feet of your right of way would drain any material amount in a short period; [or] course, the right of way would be affected.

Assuming we drill 5 wells initially on one mile of right of way, 5 wells on 8 acres, that would give you 1.37 acres per well, and we will assume that you take 50 barrels of oil per day. You would be getting at the rate of 30 some odd barrels per day per acre. I will assume that we offset. Of course, our tracts are larger; we have less density. We will assume that we drop our density from 10 acres to 5 acres. We would obtain 10 barrels per acre per day, and you would be getting 37 or 38 barrels per acre per day. Of course, beyond that, it is a legal matter. In other words, you would be drawing substantially three, or it may be four times as much per acre as we would, under

the facts that I base my answer upon. There would be appreciable drainage over a number of years. It is a matter of arithmetic. In a ten year producing life, it would be a great inequity.

With reference to the drainage in six months, we will say 32 barrels per acre, per day, 8 times 32 is 225 barrels per acre, per day. We will say that is, roughly, 7,000 a month; six months would be 42,000 barrels in six months. That would be the difference. In a year 84,000 barrels. It would be as much oil as some appraisal engineers would give for the property originally.

Q. Would not be possible to get that much when you say there will be only a production of about 8,000 barrels per well in that field?

A. I didn't quite get your question.

Q. I understood you to say that there would only be produced something like 8,000 barrels of oil per well, throughout the life of that field.

A. No, I did not make that statement. I was talking about acre yield. I left the question open as to the net [fol. 149] thickness of sand. I corrected myself in 200 barrels per acre foot to 275, and then corrected that shrinkage factor, subtracted 17½ barrels, which would give you around 260 per acre foot of Benoist, based on laboratory test core analysis from one well only. That was taken from the State of Illinois. That is as far as I can go. We are in process of doing other analytical work.

J. F. Reglin, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the Defendants, as follows:

My name is J. F. Reglin, I live in Bridgeport, Illinois. I am Division superintendent for The Ohio Oil Company. I am familiar with the Salem field, and with the wells and properties involved in this proceeding. I am familiar with the drilling costs and the costs of operating and producing wells in that locality. I have examined the drilling and equipment cost which are made a part of the petition in this case. I have examined the amendment here that was filed this morning.

I have arrived at certain figures as to the fair and reasonable cost of drilling wells such as those that are set forth in the Schedule. The cost of the well is $9,205.13. That includes everything, except pumping unit, and the necessary connections there to connect the pumping unit. The details of that are as follows: the cost of drilling, I figured, this is an 1800 foot well, $2.75 per foot, $4,950.00; connections for the flowing well would cost $250.26; total cost per well would be $9,205.13.

Cross-examination.

By Mr. Railey:

I have not made any allowance for geologist services. I have made no allowance for Schlumberger survey. It is up to the Railroad Company whether they want to use it or not, if they want to spend that money. We don't think it is necessary. I wouldn't say that you would be safe in drilling these wells without the services of a geologist. I would do it for myself. I have not included the cost of steel housing. We don't use housing, just have it out in the open. I wouldn't think there would be any more danger [fol. 150] along the right of way than there would be away from the railroad. I have not simply figured the cost out on the open field; we have operated these wells up against barns and houses, and we don't think there is any danger. I haven't included an item for railroad facilities or tank car connections. We don't use a master valve. We use a control head. I have used a float shoe. We use a National type head, rather than a Hinderliter head. I haven't figured any allowance for possible rental of adjoining property for road purposes, or any purpose of that kind, if it could be obtained.

The profit the man who drills the well would obtain, would be in the price per foot. We pay the contractor $2.75 per foot and when he drills the well he is through, that is only for drilling the well. That does not include any of the things that go into the well, such as pipe, he furnishes nothing except the drilling tools and the oil, fuel, and everything that it takes to drill the well. We allow no profit on anything except the digging of the hole in the ground. I would say $2.75 is the average cost of drilling in that field at present, but there are Companies

that are drilling with their own tools that drill much cheaper than $2.75. I know where they have been drilled on a right of way, the contract price was just the same as the other drilling. We didn't make any distinction. I know where they were drilled in Illinois on the Electric Light at Dupo. They charged around $4.00 per foot, that was cable tool drilling, that was the general price all over the field. That is the only place I know they were drilled. We allow our own company tools $1.75 a foot.

The drilling contract that we have is at the price of $2.75 per foot. This contractor has drilled two, another contractor has his sixth well, and another contractor was on the second well. Just one well is called for in their respective contracts, any place one well. We never let any contracts except for one well. The only instance that I know of well being drilled on the right of way, was where they charged $4.00; and we drilled the same well for $1.75 up against the right of way. We allowed $100.00 per well for roads.

[fol. 151] I just glanced at this amendment of the petition. I heard the testimony this morning of the amount apportioned to each of these items. I wouldn't say that $100.00 for service of geologist was reasonable, or not. A price of $125.00 for Schlumberger survey, per well, is reasonable, but I think it is up to the operator whether he thinks he needs it or not. I have not included it in my calculations because we don't think it is necessary. I have allowed nothing for steel housing for well. The railroad could build any housing they want for it, as elaborate as they wanted it. I think that it is unnecessary. Whether $225.00 was a reasonable price would depend upon the size of the building that they built. It would not need to be that large a building that would cost $225.00. I think a 50 foot building would be plenty large enough. So there is something to protect your belt is all you need. I have not taken into consideration housing there that will protect the well from sparks of engines as they go by, and protect it from the ordinary hazards of the Railroad. I wouldn't think there was danger of that kind along the railroad. I have not given consideration to any switch tracks or railroad facilities or anything of that kind. $185.00 is too much for a master valve. We use a controlhead. If the Chief Engineer of the Missouri Pacific thought that was reasonably desirable, I wouldn't question

the price of it, except it is taken off when the well is completed, so that it could be used from one well to another. You couldn't do that if you were drilling four wells at once. We substitute for that, a control valve. We bought this one for $50.00. If your tools are running at the same time on four wells, I think you would need one for each well.

The calculation of $51.00 this morning for a float-shoe is too high. We use guide shoes, which cost $22.52, and then we use a float collar on top of the joint, which costs $39.43; if $51.00 includes both of them, it would be reasonable.

We use National Supply head instead of Hinderliter head, we pay $61.00 for it, in place of Hinderliter. It answers the same purpose. Hinderliter head is more expensive, and not necessary with low pressure wells. Hinderliter is what they usually use for a high pressure well. If the Hinderliter is used, $125.00 is the usual price for it.

[fol. 152] I think $250.00 per acre for surface rights where wells are built along a narrow strip of this kind is unreasonable, because I have just made arrangements to rent surface rights for $25.00 per acre, 2 acres of surface rights. My Company does not have any surface rights. We have a lease on the land. I wouldn't say whether we have a lease on the surface rights. I would have to take it up with the management whether we will be willing to make you a lease for the surface rights, if we have them. In other words, my statement does not mean much, but I know what I can rent the surface for down there.

Q. In the calculation this morning, it was stated that an 1800-foot well at $3.25 would cost $5,850.00 for the drilling; there was included in that these various items which I have listed, thereby leaving to the driller for his service in drilling, only $2.63 as against the $2.75 that you are figuring in your calculation. Did you know that?

A. You are figuring different than I am. You are figuring on the driller furnishing a lot of extra things, that our driller does not furnish.

My figure of the cost of the well is figured on an entirely different basis than the Railroad's estimate, because I haven't included many of the items that you have included. I wouldn't think that they would be included in the cost of a well. The payment of the geologist and these other expenses are overhead, and I have nothing to do with the

overhead. I have not included those in my figures, either directly or indirectly,

I have not allowed Mr. Blackstock, the driller, any profits at all for his operation in the event the railroad's title should be defective, except what little profit he might have out of the actual drilling of the hole, $2.63 per foot. I have allowed $2.75 a foot as against the Railroad's $2.63 a foot. I figured a 7 inch casing, weight 17 pounds. I didn't see this item of cost attached to the petition and in the amendment—what size and weight of casing was figured. The casing that I use is seamless. I would say that adjustable chokes are necessary,—especially when you have to shut it down.

[fol. 153] Mr. Van Meter: Mr. Railey, in regard to The Ohio Oil Company, I have abstracts here of your right of way. There was a question where a man died leaving Caroline Rusler, a widow, and no children, and she inherited one-half (½) of the fee. Your right of way deed came from her on two of these tracts involved in The Ohio Oil Company's Lease. Are you willing to agree as to that, or not, that is you didn't have a right of way deed for a full interest as to those two tracts?

Mr. Railey: With this qualification, your Honor: There is some defect in the title to the Caroline Rusler land, the question being as to whether the deed on which we are relying conveyed more to us than a half interest. The grantor only had a half interest, but that grantor, assuming to have the entire interest, conveyed what purported to be the entire interest to us, and we have had actual, open, notorious possession of that property, under fence, for more than twenty years. So, if it be true that that deed, according to the wording is a warranty deed and it conveyed to us a fee simple interest that she owned, then it has been cured by the Statute of Limitations. So, we do not admit that we do not have the title to this property in its entirety, if it be assumed that the deed on its face purported to convey a fee simple title, as distinguished from an easement. So, we therefore get back to the ultimate question, namely, whether these deeds which purport to convey a strip of land for railroad right of way sixty feet wide, convey a mere easement or a fee simple title. If they convey a fee simple title, any defect that counsel refers to has been cured.

The Court: By the Statute of Limitations?

Mr. Railey: Yes.

Mr. Van Meter: That is a question we want to argue before your Honor.

I understand you agree that this woman only had a half interest at the time she made the right of way deed——

Mr. Railey: Provided you likewise agree that we have had an open, notorious possession under fence since that time.

[fol. 154] Mr. Van Meter: I will agree that the Railroad has been on there, under fence, for over twenty years, and you agree for the Trustee that Caroline Rusler only had a half interest at the time she made the right of way deed.

Mr. Railey: That is all right.

Mr. Railey: For the purpose of this appeal, the debtor-trustee does not question that The Ohio Oil Company and the Magnolia Petroleum Company have sufficient interest in the subject matter of this litigation to constitute them proper parties to appeal, and raises no question because of the failure of the Kingwood Oil Company to join in this appeal.

Mr. Van Meter: It is further agreed that the Missouri and Illinois Railroad Company is a subsidiary debtor in the Missouri Pacific Railroad Company reorganization proceedings, and that Guy A. Thompson is the duly appointed, qualified and acting Trustee thereof.

The above and foregoing was all of the evidence offered upon the hearing.

Approval of Narrative of Testimony by Counsel

The foregoing narrative of the testimony adduced at the hearing in the above entitled cause which is to be used on the appeals of the Magnolia Petroleum Company and The Ohio Oil Company in said cause to the United States Circuit Court of Appeals for the Eighth Circuit and the Stipulations therein contained are on this 14th day of January, 1939 approved and designated to be a part of the record on said appeals by counsel for the parties.

Russell L. Dearmont, Thos. T. Railey, Counsel for Guy A. Thompson, Trustee. Craig & Craig, by Craig Van Meter. Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Counsel for Magnolia [fol. 155] Petroleum Company. Craig & Craig, by Craig Van Meter. Cobbs, Logan, Roos & Armstrong, by Thos. H. Cobbs, Counsel for The Ohio Oil Company.

In United States District Court

Stipulation of the Parties Designating Parts of the Record, Proceedings and Evidence To Be Included in the Record On Appeal—Filed January 14, 1939

It Is Hereby Stipulated and Agreed by and between Russell Dearmont and Thomas T. Railey, Attorneys for Guy A. Thompson, Trustee of the Missouri-Illinois Railroad Company, Debtor, one of the subsidiary Debtors in the Missouri Pacific Reorganization Proceedings, the Petitioner in the above entitled Petition, and Cobbs, Logan, Roos & Armstrong, and Craig & Craig, Attorneys for the Magnolia Petroleum Company, a Corporation, and also Attorneys for The Ohio Oil Company, a Corporation:

That this said Stipulation shall serve to designate the parts of the record, Proceedings and Evidence to be included in the Record on Appeal to be filed with the Clerk of the Circuit Court of Appeals for the Eighth Circuit with reference to the consolidated appeals of the Magnolia Petroleum Company, a Corporation, and The Ohio Oil Company, a Corporation, the said two Companies having appealed from the Interlocutory Judgment and Order entered by the District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, in this matter, on the 14th day of November, A. D., 1938, the said Magnolia Petroleum Company, a Corporation, having appealed by Notice of Appeal under the Rules of Civil Procedure for District Courts, and also having appealed by Petition for Leave to Appeal and Assignment of Errors attached thereto, which said Petition for Leave to Appeal was allowed by the said District Court, and the said Defendant, The Ohio Oil Company, having also appealed by Notice of Appeal under the Rules [fol. 156] of Civil Procedure for District Courts, and also having appealed by Petition for Leave to Appeal and Assignment of Errors attached thereto, which said Petition for Leave to appeal was allowed by the said District Court, and both of said Defendants having filed two (2) Appeal Bonds in the sum of Two Hundred Fifty Dollars ($250.00) each in both of said appeals on the 12th day of December, A. D., 1938, all of said Appeal Bonds having been approved by the Honorable George H. Moore, Judge of the District Court of the United States aforesaid on the 12th day of December, A. D., 1938.

This said Petition No. 1167 having been filed in the Proceedings with reference to the Reorganization of a Railroad Number 6935 in the District Court of the United States aforesaid, it being hereby agreed by all of the parties hereto, there being only one judgment in this said Proceedings, that the said four (4) Appeals hereinabove described may be consolidated and heard in the Circuit Court of Appeals For the Eighth Circuit on one (1) Record, and that only one (1) Record shall be filed with reference to the said four (4) Appeals in the said Proceedings, and also only one (1) Record and one (1) set of Briefs be printed with reference to the said four (4) Appeals so to be consolidated with the approval of the Circuit Court of Appeals of the Eighth Circuit of the United States of America; and it is further agreed that the parties hereby designate and agree that the said Record shall contain the following as the Record on Appeal:

(1). Placita, on Convening Order.

(2). The material pleadings in this said Proceedings, including the Petition of the Trustee for determination of title and for advice and directions respecting certain proposed oil operations on right of way near Salem, Illinois, being Petition No. 1167, which said Petition was filed in this Proceedings on the 1st day of November, A. D., 1938; the Amendment to said Petition filed on the 9th day of November, A. D. 1938; also including the Answers and Amended Answers of The Ohio Oil Company, a Corporation, and Magnolia Petroleum Company, a Corporation, filed in the said proceedings, said Answers being filed on the 9th day of [fol. 157] November, A. D., 1938, and said Amended Answers being filed on the 28th day of November, A. D., 1938.

(3). The Judgment of the Court on the said hearing.

(4). Narrative of the Testimony on the said hearing.

(5). All papers filed to perfect the said consolidated appeal, including notices of appeal and petitions for leave to appeal filed by both of the said Defendants, also the four (4) Appeal Bonds, two (2) of which were filed by each of the respective Defendants.

(6). All Assignments of Errors filed by each of the said Defendants.

(7). All Statements of Points to be Relied Upon upon appeal filed by each of the Defendants.

It Is Further Stipulated and Agreed By and Between the Parties Hereto that in said Brief on this consolidated appeal either of the Defendants may raise any question that they may contend is presented by the evidence or pleadings with reference to that particular Defendant whether that particular question applies to the other Defendant or not.

It Is Further Stipulated and Agreed By and Between the Parties Hereto that it is not necessary for the Defendants to file a designation of the part of the Record to be used as the Record on appeal, and It Is Further Stipulated and Agreed By and Between the Parties Hereto as above set forth that one record shall be filed covering each and all of the four (4) consolidated appeals.

Dated this 14th day of January, A. D., 1939.

Russell E. Dearmont, Thos. T. Railey, Attorneys for the Trustees. Cobbs, Logan, Roos & Armstrong, [fol. 158] by Thos. H. Cobbs, and Craig & Craig, by Craig Van Meter, Attorneys for the Defendants, Magnolia Petroleum Company, a Corporation, and The Ohio Oil Company, a Corporation.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 159-164] Appearances of counsel omitted in printing.

[fol. 165] In United States Circuit Court of Appeals, Eighth Circuit

Nos. 11,410, 11,411

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Appellee

Nos. 11,412, 11,413

The Ohio Oil Company, Appellant,

vs.

Guy A. Thompson, Appellee

Stipulation of Admitted Facts, Etc.—Filed May 2, 1939

It is hereby stipulated that in the presentation of the above cases the Court may accept as admitted by all parties

in interest the following facts, if the Court rules they are material; the Appellants, however, hereby object to the competency, relevancy and materiality of these facts, said facts being as follows, to-wit:

That with respect to the strip of ground for right of way [fol. 166] sixty (60) feet wide conveyed by Caroline Rusler to Centralia & Chester Railroad Company over and across the tract of land described in the warranty deed dated January 3, 1898, and recorded January 25, 1898, at Page 577 in Volume 56 of the Records of Deeds, Marion County, Illinois, Guy A. Thompson, Trustee, Missouri Illinois Railroad Company, Debtor, and his predecessors in interest have currently for more than twenty (20) years prior to the institution of these proceedings paid all taxes legally assessed or assessable thereon in pursuance to Sections 46-47, Chapter 120, Illinois Revised Statutes, 1935, which said strip was assessed and the taxes paid thereon as "Railroad tract" irrespective of the Estate owned therein by the said Trustee and his predecessors in title, along with and in the same manner as all right of way lands of said Company in said County, as required by Statute, without specifically describing said right of way tract or the estate owned therein.

Thos. H. Cobbs, Craig Van Meter, Wm. H. Armstrong, Attorneys for Appellants. Russell L. Dearmont, Thomas T. Railey, Attorneys for Appellee.

Dated April 26th, 1939.

[File endorsement omitted.]

[fol. 167] In United States Circuit Court of Appeals

Order of Submission in Causes Nos. 11410, 11411, 11412 and 11413—May 11, 1939

These causes having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. Thomas H. Cobbs for appellants, continued by Mr. Thomas T. Railey for appellee and concluded by Mr. Craig Van Meter for appellants.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 168] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 11,410 and 11,411—May Term, A. D. 1939

MAGNOLIA PETROLEUM COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Appellee

Appeals from the District Court of the United States for the Eastern District of Missouri

Nos. 11,412 and 11,413—May Term, A. D. 1939

THE OHIO OIL COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor, Appellee

Appeals from the District Court of the United States for the Eastern District of Missouri

[August 29, 1939]

Mr. Thomas H. Cobbs and Mr. Craig Van Meter (Mr. William H. Armstrong and Mr. Fred H. Kelly were with them on the brief) for appellants.

[fol. 169] Mr. Thomas T. Railey (Mr. Russell L. Dearmont was with him on the brief) for appellee.

Before Sanborn and Thomas, Circuit Judges, and Sullivan, District Judge.

OPINION

THOMAS, Circuit Judge, delivered the opinion of the court:

These are four appeals in bankruptcy consolidated by stipulation of the parties and presented upon a single record. There are but two appellants, and two of the appeals are precautionary only. The issues arise in sum-

mary proceedings under section 77 of the Bankruptcy Act (Section 205, Title 11, U. S. C. A.) for the reorganization of a railroad in In the Matter of Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor. The appeals are from an interlocutory order entered November 14, 1938.

The summary proceeding in which the dispute arises was commenced by the appellee trustee on November 1, 1938, on which date he filed a petition in the bankruptcy court having jurisdiction of the reorganization proceedings. The petition was entitled "Petition of Trustee for Determination of Title and for Advice and Directions Respecting Certain Proposed Oil Operations on Right-of-way Near Salem, Illinois."

The petition alleged that by orders previously entered in the reorganization proceedings the trustee had been granted blanket authority to enter into gas and oil leases and to contract for the drilling of oil wells on the rights of way of the debtor companies; that the right of way of the subsidiary Missouri-Illinois Railroad traverses territory in Illinois where oil deposits under the ground have been proved to exist in paying quantities; and that the trustee had accordingly solicited bids for lease of oil rights upon the right of way of the subsidiary across Section 20, Township 2 North, Range 2 East of the 3rd P. M., in Marion County, Illinois.

It was further alleged that the appellant oil companies had served notice upon the trustee questioning his right and title to the oil under the right of way; that he is advised that there may be other parties, unknown by name, who will [fol. 170] contend that they own certain interests in portions of the oil and gas underlying the right of way; and that "because of these possible adverse claims, Trustee now seeks advice and directions of the Court in the premises."

It is then alleged that the subsidiary had, and that the trustee has succeeded to, the title originally conveyed to the Centralia & Chester Railroad Company by the three following warranty deeds. The first, dated August 13, 1896, conveys

"A strip of land for right of way for said railroad Company Sixty feet wide over and across the Southwest Quarter (¼) of the Northeast Quarter (¼) of Section Twenty

(20), Township Two (2) North, Range Two (2) East of the Third Principal Meridian."

The second deed, dated August 14, 1896, conveys

"A strip of ground Sixty-six (66) feet wide for right-of-way for said Railroad Company over and across the East Half (½) of the Northwest Quarter (¼) of the Southwest Quarter (¼) of Section Twenty (20) in Township Two (2) North, Range Two (2) East of the Third Principal Meridian."

The third deed, dated January 3, 1898, was executed by Caroline Ruster, a widow, and purports to convey

"A strip of ground for right-of-way for said Company Sixty feet (60) wide over and across the Southeast Quarter (¼) of the Northeast Quarter (¼) and the West Half (½) of the Northwest Quarter (¼) of the Southwest Quarter (¼) and the Southeast Quarter (¼) of the Northwest Quarter (¼), all of said lands in Section Twenty (20), Town- Two (2) North, Range Two (2) East of the third principal Meridian, it being the strip of land over and across said above described tracts of land where the said Railroad is now located."

It was further alleged that the petitioner is advised, and believes that shortly after the conveyances were delivered, the lands so conveyed had been fenced and used by the trustee and his predecessors without interruption for at least 20 years; and that he believes that he is lawfully vested with title to all the oil and mineral rights under the land.

[fol. 171] The petition then alleges:

"Petitioner is advised and believes that numerous oil wells have been drilled in close proximity to Trustee's right-of-way, and that unless prompt action be taken to remove the oil underlying said right-of-way, it will be drained into the wells on adjacent lands, and the value thereof will be forever lost to the stockholders and creditors of the Missouri-Illinois Railroad Company.

"This court of bankruptcy, by reason of Trustee's possession of said property, has jurisdiction, under Section 77 of the Bankruptcy Act, to determine all questions respecting title thereto, and pending the determination of said title,

has jurisdiction to instruct and direct Trustee to take such action as the Court may deem advisable to prevent the waste of said oil and to recover and salvage it for the interest of the owners as their rights may by this Court be hereinafter determined, and has authority to direct that the expenses thereof be paid out of the proceeds of the oil so recovered. It is not, in the opinion of Trustee, practicable or advisable to await the adjudication of adverse claims and the possible review of this Court's decision respecting title before beginning the drilling for oil upon said right-of-way.

"After a careful analysis of the various bids hereinabove referred to, and having due regard for financial backing, experience, and reputation of the bidders, and the terms and conditions offered, Trustee is advised and believes that the bid most favorable to the trust estate is that made by the Blackstock Oil Company.

"Subject to the approval of this Court, Trustee has therefore negotiated a contract with Blackstock Oil Company, copy of which is filed herewith as 'Exhibit A.'"

The proposed contract with the Blackstock Oil Company is then set out in full.

The petitioner recommended that appellants be subpoenaed and that notice be published directed to other claimants to appear and show cause, upon a day fixed, why the court should not decree that the oil and mineral rights under the right of way across section 20 is not vested in the petitioner, and that upon their failure to show cause they be enjoined from asserting title to the land or to the oil and gas thereunder; and that the petitioner be authorized to [fol. 172] execute the contract with the Blackstock Oil Company, to sell the oil and to impound the profits for the benefit of the owners as finally determined by the court.

On November 9, 1938, the appellant oil companies appeared and filed answers to the trustee's petition. They alleged that they held oil leases from the owners of the fee titles to the lands in question by virtue of which they were the owners of the oil, gas and minerals underlying said lands. They admitted the execution and delivery of the deeds relied upon by the trustee, but alleged that the deeds conveyed only railroad right of way easements over the land and did not convey the oil and gas rights thereunder; and they denied that the trustee or his predecessors in interest had ever had title to or possession of the oil, gas and mineral rights underlying the right of way. They denied

that the court had jurisdiction in this summary proceeding to determine the adverse claims of the parties to the oil and gas rights on the ground that the trustee had neither actual nor constructive possession of the underlying oil and gas. They alleged that the trustee, having only an easement, had no right to let a contract for the drilling of wells on the right of way to the underlying oil deposits, and that the court was without jurisdiction to direct him to do so. They denied title by adverse possession; and it was alleged that Caroline Rusler at the time she executed and delivered the third deed, set out above, owned only an undivided one-half interest in the land described therein.

A hearing was had before the court upon the petition of the trustee and the answers of the appellants on November 9, 1938. In his opening statement to the court, counsel for the trustee said that the trustee asked the court to issue an order of publication bringing in any adverse claimants who are unknown and that the court hear evidence and determine the claims to adverse title. He then proceeded:

"Since the printing of this publication will require some time, or may require some time and the oil under the right of way be dissipated and drawn into other wells pending this delay, the Trustee, following precedents often followed in these oil cases, has asked the Court to vest Mr. Thompson, as Trustee of the Missouri-Illinois Railroad, with the same authority that is usually vested in an independent receiver appointed pendente lite, that is, with the power to [fol. 173] drill—to enter into a drilling contract, to conserve and sell the oil, and to hold the proceeds of the oil for the account of whom concerned, as determined by the subsequent order of this Court, paying out in oil, as far as possible, the reasonable expenses of drilling, conserving and selling the oil. * * *

"The question, therefore, is whether the conveyance of a strip of land for right of way sixty feet wide is a conveyance of a fee simple title of that land, the description of right of way being merely descriptive and for the purpose of locating the particular narrow strip of land, or whether that is merely a conveyance of a right of way which would be a mere easement for railroad purposes and, according to the claim of these adverse claimants, would not authorize the Trustee to drill and retain the oil underlying that property. That is the real question that is before this court,

and it may be necessary for the Court to make up his mind on that question in connection with this particular motion (petition)."

The testimony taken on the hearing is set out in the record. The deeds relied upon by the trustee and the leases under which the appellants claim were admitted in evidence. The other testimony was directed to the claim of the trustee that numerous oil wells have been drilled in close proximity to the right of way and that unless prompt action be taken to remove the oil it would be drained off and lost; to the cost of drilling and the number of wells necessary to preserve the oil; and to the ability of the Blackstock Oil Company to drill the wells and market the oil.

It was stipulated that Mrs. Rusler had but a half interest in the land described in the deed executed by her, and that the railroad had been on the land and that it had been fenced for over twenty years.

The interlocutory order appealed from enjoined, until the court may order otherwise, all parties, regardless of whether their appearance shall have been entered in these proceedings, from asserting or attempting to enforce, other than in these proceedings, any adverse claim to the premises or to the mineral, oil or gas in or underlying said premises or extracted therefrom, or from attacking or interfering with the title thereto of any purchaser holding under or through the trustee.

[fol. 174] The interlocutory order also purported to vest the trustee with title to the oil and gas underlying or removed from the premises with right to convey the title thereto free and clear of all claims predicated upon alleged adverse ownership of any part of the land upon which the right of way is situated. The order further authorized the trustee to enter into a contract with Blackstock Oil Company to drill not more than six wells on the right of way over the lands title to which is in dispute, and to remove, conserve and market the oil and gas taken from the premises. It was provided that the proceeds from the sale of such oil and gas shall be paid over to the trustee, after deducting the expenses provided for in the contract and other necessary expenses in drilling, removing, conserving and marketing said oil and gas; and that the trustee shall hold the remainder of the proceeds for the account of ad-

verse claimants and parties in interest as their respective rights may hereafter be determined by the court.

The order also provided for publication of notice to all claimants to appear and show cause why the court should not decree that the trustee is not vested with title to all the oil and mineral rights under its right of way across said section 20; and the court reserved jurisdiction to hear on their merits any adverse claims to title.

It is clear that the trustee in this summary proceeding, by his petition for advice and directions, sought an order of the court of bankruptcy in the nature of a decree quieting title to its right of way across Section 20 against the appellant oil companies and unknown claimants. He further sought an order clothing him with the powers of a receiver pendente lite and authorizing him to extract the oil underlying the right of way and to market it. The appellants challenged the jurisdiction of the court to determine title or to grant the trustee the requested powers. The court not only granted all the trustee asked, but also enjoined appellants and all other claimants from asserting any rights or claims other than in these proceedings and from interfering with the drilling of wells and marketing the oil. In vesting the trustee with the powers of a receiver and authorizing him to drill wells and sell the oil, no bond for the protection of the appellants was required and no restrictions were imposed upon the price for which the oil [fol. 175] may be sold nor the expenses which may be incurred in producing it.

The first question presented upon this appeal, as it was the first question for the determination of the court below, relates to the jurisdiction of the district court as a court of bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land underlying the railroad right of way in which the oil deposits are found.

It is now settled that the bankruptcy court has power in a summary proceeding to adjudicate, without consent, controversies concerning the title to property the physical possession of which is in the actual or constructive possession of the trustee, and, with consent of the adverse claimants, the title to property not in the possession of the trustee; but the court is without power to adjudicate adversary claims to the title to property, without consent, not in the actual or constructive possession of the trustee. See Taubel-Scott-Kitzmiller Company, Inc. v. Fox, et al., 264 U. S. 426, 432-3;

Steelman v. All Continent Corp., 301 U. S. 278, 286; Schumacher v. Beeler, 293 U. S. 367; Taylor v. Sternberg, 293 U. S. 470; First Nat. Bank v. Conway Road Estates Co., 8 Cir., 94 F. (2d) 736, 737; In re Prima Co., 7 Cir., 98 F. (2d) 952, 957.

Upon the question of possession and jurisdiction, the court found:

"(a) That said Guy A. Thompson, as Trustee, Missouri-Illinois Railroad Co., Debtor, acting under the jurisdiction of this Court, is in actual possession of the property hereinbefore described, under assertion of claim to fee-simple title thereto, and that this Court has accordingly jurisdiction over the subject matter and is vested with authority to determine the interest of adverse claimants in and to the mineral, oil and gas rights in and underlying said property and to protect the interest of the Trustee therein."

The appellants contend that the court erred in finding that the trustee is in actual possession of the property, and that it consequently erred in assuming jurisdiction to go forward and make the order complained of here. The evi- [fol. 176] dence to support this finding consists of the deeds conveying the right of way to the trustee's predecessor in interest and the admission that the railroad company has constructed and operates a railroad thereover. Counsel for the parties agree that if the deeds conveyed a fee simple title to the strip of land granted such title and possession are sufficient to support the jurisdiction of the court to adjudicate the controversy; and they also agree that if the deeds grant and convey a railroad right of way easement only, such possession did not extend either actually or constructively to the oil and gas underlying the right of way, from which it would follow that the court was without jurisdiction.

In United States v. Corrick, 298 U. S. 435, 487, the Supreme Court said that "On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion." The court held in that case that when "want of jurisdiction is evident upon the face of the bill" such action by the lower court constitutes an abuse of discretion. If we go no further at this point than to discuss the subject of jurisdiction, that rule must be applicable in the present case. Here the peti-

tion of the trustee sets out the deeds under which he claims to have derived a fee simple title to the land under the right of way, and under which his predecessor took possession. The deeds are the basis of his claim to actual possession as well as of his claim to the right of possession of the oil and gas. When, therefore, the court found that the trustee is in "actual possession" he was bound to find, and his finding implies, that the deeds in question conveyed a fee simple title to, and not an easement in, the strip of land described.

This situation compels this court, in order to arrive at a conclusion as to whether or not the lower court abused its discretion in entering the order appealed from, to consider and determine whether or not the deeds conveyed a fee simple title or only a railroad right of way easement. Stated concretely, the question to be answered is whether a warranty deed conveying to a railroad company "A strip of ground (land) 60 (66) feet wide for right of way for said railroad Company over and across" a larger tract of land vests a fee simple title in the grantee or only a railroad right of way easement.

[fol. 177] Counsel for the parties agree that since the land in question is situated in Illinois the construction of the deeds is controlled by the laws of that state. Ruhlin v. New York Life Ins. Co., 304 U. S. 202; Benedict v. Ratner, 268 U. S. 353, 359; Buford v. Kerr, 8 Cir., 90 F. 513, 514. No Illinois decision has been found in which a deed or other conveyance has been construed where the granting clause is identical with that found in the deeds under consideration. Under these circumstances we have no choice but to analyze the issues for ourselves, exercising an independent judgment with respect to the issues presented, aided by and with deference to the Illinois law of conveyancing. Driscoll v. Edison Light & Power Co., — U. S. — 59 S. Ct. 715, 83 L. ed. — .; Terry v. New York Life Ins. Co., 8 Cir. 104 F. (2d) 498, 502; Verbest, Trustee, v. Michael Yundt Company, 8 Cir., (decided July 19, 1939); New York Life Ins. Co. v. Jackson, 7 Cir., 98 F. (2d) 950, 952.

Under Illinois law a railroad company may acquire its right of way by condemnation (Section 13 Article 2 of the Constitution of Illinois) or by deed. The estate acquired by condemnation proceedings is an easement only, and the fee remains in the owner. Chicago & E. I. R. Co. v. Clapp, 201

Ill. 418, 66 N. E. 223; Branch v. Central Trust Co., 320 Ill. 432, 151 N. E. 284, 288. The estate acquired by deed may be either an easement or a fee simple title. If the deed grants a right of way only the fee remains in the grantor and the railroad company is vested with an easement and can use the land for railroad purposes only. Wiggins Ferry Co. v. O. M. Ry. Co., 94 Ill. 83; Ill. Cent. R. Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563; Walker v. Ill. Cent. R. Co., 215 Ill. 610, 74 N. E. 812; Branch v. Central Trust Co., supra; Joseph v. Evans, 338 Ill. 11, 170 N. E. 10, 14. But the company may acquire by deed an unlimited fee simple estate in the land used by it for its right of way or for other railway purposes. Ill. R. S. 1927, c. 114, § 20 (3); Walker v. Ill. Cent. R. Co., supra; Spierling v. Ohl, 232 Ill. 581, 83 N. E. 1068; and see Rockford Trust Co. v. Moon, 370 Ill. 250, 18 N. E. 2d 447; Noyes v. St. Louis, A. & T. H. R. Co., (Ill.) 21 N. E. 487.

Prior to the adoption of the Conveyancing Act in Illinois deeds were construed according to the rules of the common [fol. 178] law, and the word "heirs" was essential to an inter vivos conveyance of an estate of inheritance. A grant of land to "A and his heirs" was held sufficient to convey a fee simple title, and so far as the habendum clause in the deed was inconsistent it was held void. The Conveyancing Act was designed to abolish the technical rules of the common law relating to the construction of deeds. It provided (Ill. R. S. 1937, c. 30, § 12) that "Every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance, be not added, shall be deemed a fee-simple estate of inheritance if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law." Under this statute the use of the word "heirs" is no longer necessary to the conveyance of a fee; and "the estate granted may be defined or limited by language used in any part of the deed without reference to the rule of construction as to the granting clause." Harder v. Matthews, 309 Ill. 548, 141 N. E. 442, 444.

While the statute, supra, requires that every estate shall be deemed an estate in fee unless a contrary intention is clearly expressed, it is not essential that express words of limitation be used if it appears by necessary implication that

a less estate was granted. Lehndorf v. Cope, (Ill.) 13 N. E. 505; Hempstead v. Hempstead, 285 Ill. 448, 120 N. E. 782.

In the construction of deeds to which the conveyancing statute is applicable the Illinois court has repeatedly held that the primary object is to ascertain and give effect to the intention of the parties unless to do so will violate an established rule of property. Cover v. James, 217 Ill. 309, 75 N. E. 490; Waller v. Hildebrecht, 295 Ill. 116, 128 N. E. 807; Bear v. Milliken Trust Co., 336 Ill. 366, 168 N. E. 349; Woods v. Seymour, 350 Ill. 493, 183 N. E. 458. "Where words of inheritance are not used, the entire context may be considered, and every word used must, if possible, be given weight in determining the estate granted." Woods v. Seymour, supra; Bear v. Milliken Trust Co., supra. Force should be given to each clause and the intention of the parties as gathered from a consideration of the whole instrument is to be given effect; no word or term employed by the parties should be rejected as meaningless or surplusage. Mittel v. Karl, (Ill.) [fol. 179] 24 N. E. 553; Bauman v. Stoller, 235 Ill. 480, 85 N. E. 657; Kearney v. Kirkland, 279 Ill. 516, 117 N. E. 100. But in ascertaining this intention "the courts are not confined to the strict and literal construction of the language used when to do so will frustrate the intention of the parties as gathered from the four corners of the instrument." Kearney v. Kirkland, supra; McCoy v. Fahrney, (Ill.) 55 N. E. 61; Bear v. Milliken Trust Co., supra.

The deeds under consideration are statutory deeds without words of inheritance. The paramount rule of construction should, therefore, be to give effect to the intent of the grantor, if it is legal, as collected from the whole instrument; but, if doubt as to the meaning of the words used arises, such doubt must be resolved in favor of the grantee, unless surrounding circumstances indicate a contrary intent. Williams v. Swango, 365 Ill. 549, 7 N. E. 2d 306, 309; Wise v. Wouters, 288 Ill. 29, 123 N. E. 35.

It is necessary in applying these rules of conveyancing and of the construction of deeds to keep in mind the distinction on the one hand between a fee in land and the description in the grant of a fee and on the other hand a railroad right of way easement and the description in the grant of such an easement.

The grant of a fee in land conveys to the grantee complete ownership, immediately and forever, with the right of pos-

session from boundary to boundary and from the center of the earth to the sky, together with all lawful uses thereof. Under Illinois law a deed will effect this result if it contains appropriate words of grant and a definite description of the land. If the deed is in this form and in addition contains words stating the purpose or use contemplated by the parties to the contract such words are regarded as surplusage and not as conditions or restrictions, as will be pointed out below. The two esentials of such a deed are the words of grant and the clear description of the thing granted.

The essentials of the conveyance of an easement are also the words of grant and the description of the thing granted; but an easement is not the compete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent. An easement is a right only to one or more particular uses; and a deed conveying an [fol. 180] easement must not only describe the land to which the use granted attaches, but it must also describe the particular use or uses permitted. Words, therefore, which, if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed.

An examination of the deeds under consideration with the Illinois law and rules of construction in mind is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the railroad company only a right of way easement for its railroad, and not a fee. The language used to describe the easement is apt and appropriate for that purpose and no other. It designates the land to be subject to the use—"a strip of land 60 (66) feet wide * * * over and across"; it describes the use permitted—"for a right of way for said railroad." This language makes it perfectly clear that the parties met for the sole purpose of contracting for a railroad right of way. Obviously the railroad company was interested at that time in no other use of the land else it would assuredly have acquired more than a strip of land 60 feet wide.

Counsel for appellee argue that the words "over and across", as used in the deeds, are descriptive of the words "right of way", and the words "right of way" are descriptive of location by reference to the intended use of the "strip of ground" to be conveyed. In this we think they err. The words "over and across" are descriptive of the location of

the "strip of ground", and the words "for right of way" describe the use or easement, that is, the estate intended to be conveyed. No other view can be reconciled with the language of the Rusler deed where there is added to the description the words, "it being the strip of land over and across said above described tracts of land where the said Railroad is now located." The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently.

To sustain the contention that the deeds to the railroad company convey a fee the appellee, emphasizing the words "for a right of way for said railroad company", relies upon cases holding that where a deed conveying a fee contains [fol. 181] words merely declaratory of the purpose of the conveyance such words do not, of themselves, render the estate conditional nor operate as a restriction upon its use. Rockford Trust Co. v. Moon, 370 Ill. 250, 18 N. E. 2d 447; Weihe v. Lorenz, 254 Ill. 195, 98 N. E. 268; Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364; Tinker v. Forbes, 136 Ill. 221, 26 N. E. 503; Warren County v. Patterson, 56 Ill. 111; Noyes v. St. Louis, A. & T. H. R. Co., (Ill.) 21 N. E. 487. A brief analysis of these cases discloses that they are not in point.

In the Moon case, supra, the grant was of a definitely described tract of land to a railroad company. Standing alone at the end of the deed were the words: "Growing out of the construction and operation of the railroad of said Company, its successors and assigns." The issue decided arose in a suit to quiet title after the land ceased to be used for railroad purposes. It was contended that the quoted words of the deed created a right of entry for condition broken or a possibility of reverter when the land ceased to be used for railroad purposes. In denying this contention the court said: "Even where the deed contains words stating the consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional * * *. The clause in the deed has no meaning and stands alone."

In the Weihe case, supra, the deed conveyed a tract of land described by metes and bounds, and added "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz, for alley purposes." The

court held that the words, "for alley purposes" did not limit the estate granted.

In the Patterson case, supra, the grantor agreed to sell to the grantee "block number 16 in the City of Monmouth * * * for Court House and other County Buildings." The court held in substance that the words "for Court House" etc. did not create a condition nor limitation on the power of alienation.

In the Tinker case, supra, the deed conveyed lots 12 and 13 and also, "for the purpose of locating the proper water wheels and races to draw said water, the east half of lot 9" etc. In an injunction suit to restrain the construction of a building on the east half of lot 9 the court held that the quoted words did not constitute a condition nor indicate an [fol. 182] intention that the appropriation of the premises to any other purposes should have the effect of defeating the estate granted.

The case of Downen v. Rayburn, supra, was an action of ejectment; and the issue was whether the conveyance of "a certain tract or parcel of land to be used as a church location * * * described as follows: Lot No. 16, in block No. 5, * * * to have and to hold the said premises * * * forever" vested a fee simple or a conditional fee. The question of whether or not the deed vested an easement was not raised. The court observed that "If the words in question (to be used as a church location) can be regarded in any sense a condition, they must constitute a condition subsequent, and not a condition precedent. 'A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated.'" It was held that the words in question do not constitute a condition subsequent but are merely declaratory of the purpose of the conveyance.

Noyes v. St. Louis, A. & T. H. R. Co., supra, was a suit to remove a cloud or title. Following the granting clause in a deed to two railroad companies was the statement: "The above tract is granted to said companies for the erection and maintenance thereon of the freight house of said companies, or either of them, together with side tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company." The issue was whether these words constituted a condition subsequent rendering the grant liable to be defeated by failure to perform the

conditions imposed. The court observed that the language used is very broad and general; that it authorizes the use of the ground for general railroad purposes as well as for the specific purposes named; that "The property at all times has been used for railroad purposes, and has at no time been devoted to any other or different use;" and the court said: "We are not inclined to hold that the deed vested the title in the grantees upon condition to be subsequently performed; and if the grant was conditional we could not say, from the record in this cause, that in the use made by the grantees and their assigns of this land there is such a substantial failure to perform as would justify the setting aside of the deed."

[fol. 183] Counsel in effect concede that the issue in each of these cases was whether the deeds granted a fee or a conditional fee; while in the present case the question is whether the instruments convey a fee or a railroad right of way easement. But, they say, "Each of the decisions does specifically hold that language designating the intended use to which the property conveyed is to be subjected, does not constitute a limitation or restriction upon the absolute fee-simple title that would otherwise be conveyed"; and they contend that if a declaration of the use intended to be made in the conveyance of a fee does not limit the grant, then the same sort of description of the use can not change the grant from a fee to an easement. Therefore, they conclude, the conveyance of a "strip of land for right of way for said railroad company" is a conveyance of the fee title and not of an easement solely for railroad purposes.

The argument confuses the language necessary to the description in the grant of estates of different types. A fee and a perpetual easement, as in these deeds, are both freeholds in Illinois. Funston v. Hoffman, 232 Ill. 360, 83 N. E. 917, 918. Both may be conveyed subject to conditions and limitations. But the description of the use or easement in the one cannot be compared with the declaration of purpose in the other without obscuring the intent of the grantor of the easement.

It is further argued upon this point that in any event a railroad right of way has the attributes of a conditional fee, the implied inference again being that the effect of words used to declare the purpose of the grant of a fee is the same as the effect of similar words used to describe an intent

to convey a railroad right of way easement. To support this reasoning counsel cite Walker v. Ill. Cent. R. Co., 215 Ill. 610, 74 N. E. 812; Oswold v. Wolf, 126 Ill. 542, 19 N. E. 28; Western Union Tel. Co. v. Penn. R. R. Co., 195 U. S. 540, 570; New Mexico v. United States Trust Co., 172 U. S. 171; and Meyer v. Pittsburg C., C. & St. L. Ry. Co. (Ind. app.), 113 N E. 443. These decisions are based upon the fact that the degree of interest in land granted in an easement differs with the nature of the easement. In an easement for a path or way over land the interest is slight; in an easement for a canal for flowage right the degree of interest is much greater. In one sense some of the attributes of a fee may inhere in an easement. [fol. 184] As pointed out in the Walker case, supra, a right of way for a railroad is an easement, which includes the right to use a strip of land perpetually and practically exclusively. No unauthorized person has any right upon the premises for any purpose. This is very different from saying that such a right of way is a conditional fee. Although the grant of a railroad right of way gives a right to the exclusive use of the surface for railroad purposes it does not convey a fee title to the oil and gas several hundred feet below the surface. Extracting the oil and gas and selling them is not an element of use for railway right of way.

These arguments, while in some respects persuasive, are not convincing. It must be true according to the rules of construction of deeds prevailing in Illinois and recited above that the only purpose of construction is to determine the intent of the parties, or more particularly of the grantor. This is true when the dispute is whether the grant is of a fee or a conditional fee as well as when the question is whether it is a fee or an easement. But when the court examines the writing to discover the grantor's intent as expressed therein the inquiry is not the same in the two cases. When it is admitted that the instrument grants a fee courts do not look with favor upon conditions subsequent, and words indicating purpose or use will not be construed as restrictions, Noyes v. St. Louis, A. & T. H. R. Co., supra; but the distinguishing characteristic of an easement is a use, and the instrument creating the right must give a reasonably accurate description of the right conveyed. 19 C. J. 906. The Supreme Court of Illinois did not ignore words descriptive of the purpose of the grant when it be-

came necessary to determine the issue of whether a deed operated as a conveyance of a fee or of an easement in Waller v. Hildebrecht, supra. And in the deeds now before us the words "for right of way for said railroad company" cannot be disregarded without violating the fundamental rule of construction that the intent of the parties must be gathered from the instrument as a whole.

In the Waller case, supra, it was held that considering the object to be attained a warranty deed granting for a stated consideration the east 10 feet of lot 7 and the south 10 feet of lot 6 "to be used as alley, only, in common by [fol. 185] both parties hereto" conveyed a right of way only and not a fee. And the construction to be placed upon right of way deeds in general is illustrated in the opinion of the Supreme Court of Illinois in the case of Branch v. Central Trust Co., 320 Ill. 432, 151 N. E. 284.

While the decisions of courts of other jurisdictions construing deeds similar to the deeds involved in this cause are in conflict we think the weight of authority supports the views herein expressed. Some of the leading cases pro and con are cited in the footnote.[1] The generally accepted

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[1] Pro: Abercrombie v. Simmons, 71 Kans. 538, 81 P. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 500, 6 Ann. Cas. 239; Roxana Petroleum Corp. v. Jarvis, (Kans.) 273 P. 661; Danielson v. Woestmeyer (Kans.) 293 P. 507; Chicago Great Western R. Co. v. Zahner, (Minn.) 177 N. W. 350; Norton v. Duluth Transfer Co., (Minn.) 151 N. W. 907; State v. Griffith, (Mo.) 114 S. W. 2d. 976; Kansas City Southern Ry. Co. v. Sandlin, (Mo. App.) 158 S. W. 857; City of Knoxville v. Phillips (Tenn.) 36 S. W. 2d. 434; Parks v. Gates, (Cal.) 199 P. 40; Blakely v. Chicago, K. & N. R. Co., (Nebr.) 64 N. W. 972; Fitchburg R. Co. v. Frost, (Mass.) 16 N. E. 773; Rogers v. Pitchford, (Ga.) 184 S. E. 623; Gaston v. Gainesville & D. Electric Ry. Co., (Ga.) 48 S. E. 188; Noel Estate v. Kansas City Southern & Gulf Ry. Co., (La.) 175 So. 468; and see Alabama Great Southern R. Co. v. McWhorter, (Ala.) 80 So. 839; Netherlands American M. Bank v. Eastern Ry. & L. Co. (Wash.) 252 P. 916; Barton v. Jarvis, (Ky. app.) 291 S. W. 38; Ottumwa, C. F. & St. P. R. Co. v. McWilliams, (Ia.) 32 N. W. 315; Jones v. Van Bochove (Mich.) 61 N. W. 342; Quinn v. Pere Marquette Ry. Co., (Mich.) 239 N. W. 376; People v. Walsh, (N. Y.) 105 N. E. 136; Robinson v. Missisquoi R. Co. (Vt.) 10 A. 522; Atlanta,

rule is stated in 1 Thompson on Real Property 534, par. 421, as follows:

"Where the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed."

We are not unmindful that in construing a deed somewhat similar to the deeds involved in this case the district court of Illinois in Carter Oil Company v. Welker, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, in so far as it is inconsistent, if at all, with the views herein expressed, we are not inclined to follow it.

[fol. 186] A further question for consideration concerns the rights of the parties to the oil and gas underlying the land described in the deed by Mrs. Rusler. We do not regard the difference in this and in the other two deeds as of any consequence. This deed vested only a railroad right of way easement in the grantee at most. The parties have stipulated that the deed was executed and delivered by Mrs. Rusler to the trustee's remote grantor; that at that time she owned only an undivided half interest in the premises described in the deed; and that the railroad company has had possession of the right of way over the land and has

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B. & A. Ry. Co. v. Coffee County (Ga.) 110 S. E. 214; New York Cent. & H. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50.

Contra: Marland v Gillespie (Okla.) 33 P. 2d. 207; Brightwell v. International-Great Northern R. Co., (Tex.) 49 S. W. 2d. 437; Johnson v. Yaldosta, M. & W. R. Co., (Ga.) 150 S. E. 845; Killgore v. Cabell County Court, (W. Va.) 92 S. E. 562; Ballard v. Louisville & N. R. Co., (Ky. app.) 5 S. W. 484; and Compare Sherman v. Sherman, (S. D.) 122 N. W. 379; Arkansas Improvement Co. v. Kansas City So. Ry. Co., (La.) 181 So. 445; Breckinridge v. Delaware L. & W. R. Co., (N. J. Ch.) 33 A. 800; Concklin v. New York Cent. & H. R. R. Co., 134 N. Y. S. 191; Stevens v. Galveston, H. & S. A. Ry. Co., (Tex. app.) 212 S. W. 639; Groce v. Southern Ry. Co., (S. C.) 162 S. E. 425; Radetsky v. Jorgensen, (Colo.) 202 P. 175; Des Moines City Ry. Co. v. City of Des Moines, (Ia.) 159 N. W. 450.

had the land under fence for more than 20 years. It is conceded that there is a defect in the title; but appellee claims that such defect has been cured by the statute of limitations.

Since we hold that the deed granted only an easement to the railroad company, it follows that the possession of the trustee and his grantors under the deed did not extend to the oil and gas underlying the land. It also follows that possession of the surface for a railroad right of way was not notice of a claim to the oil and gas thereunder. Branch v. Central Trust Co., supra. Under the issues the court is not called upon to determine whether or not the railroad company has acquired complete title to its right of way over the land by adverse possession.

Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the trustee was not in actual or constructive possession, that part of the order appointing a receiver pendente lite with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. Compare: Burnrite Coal Co. v. Riggs, 274 U. S. 208; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 640; Atlantic Trust Co. v. Chapman, 208 U. S. 360; United States v. Stone, 7 Cir., 187 Fed. 577; Noxon Chemical Products Co. v. Leckie, 3 Cir., 39 F. (2d) 318; W. F. Potts Son & Co. v. Cochrane, 5 Cir., 59 F. (2d) 375; Beach v. Macon Grocery Co., 5 Cir., 125 Fed. 513; In re Forty-one Thirty-six Wilcox Bldg. Corp., 7 Cir., 100 F. (2d) 588.

[fol. 187] But there is no occasion for this court to consider that part of the order appointing a receiver pendente lite at this time. The record does not show that the receiver took possession under the order appealed from; nor that the authorized contract was executed with the Blackstock Oil Company; nor that wells were ever drilled and oil taken and sold; nor that the appellants have sustained any damages as a result of any acts of the receiver. If it should be that the appellants claim to have a cause of action against the petitioner in his capacity, either as trustee or as receiver it is presumed that the court will determine and adjudicate such claim according to the settled rules of equity applicable.

We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land described in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void.

It follows that the interlocutory order must be and it is reversed in its entirety with directions to the court below to dismiss the petition for want of jurisdiction.

Reversed.

[fol. 188] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,410

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,411

Magnolia Petroleum Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,412

The Ohio Oil Company, Appellant,

vs.

Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

No. 11,413

THE OHIO OIL COMPANY, Appellant,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor

Appeals from the District Court of the United States for the Eastern District of Missouri

[fol. 189] DECREE—September 5, 1939

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the interlocutory order of the said District Court appealed from, in these causes be, and the same is hereby, reversed in its entirety, with costs; and that the Magnolia Petroleum Company and The Ohio Oil Company have and recover against Guy A. Thompson, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, subsidiary Debtor, the sum of — Dollars for their costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court with directions to dismiss, for want of jurisdiction, the Petition of Trustee for Determination of Title and for Advice and Directions respecting certain Proposed Oil Operations on Right-of-way near Salem, Illinois.

[fol. 190] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Nos. 11,410-11,411

Nos. 11,412-11,413

[Titles omitted]

PETITION FOR HEARING—Filed September 18, 1939

Comes now Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, appellee, and respectfully peti-

tions this Court for a rehearing for the reasons following, to wit:

1

The Court has erred in holding, in effect, that a description of the use for railroad right of way, following the grant of the tract or strip of land in question, is a limitation of the use of the land for right of way purposes—in other words, an easement. In reaching its conclusion this [fol. 191] Court has failed to give proper weight to such authoritative decisions as Rio Grande Western Ry. Co. v. Stringham, 239 U. S. 44, 47, holding that a railroad right of way is in reality nothing more nor less than a limited fee in the nature of an easement; and this Court has erred in failing to follow such authoritative decisions of the Supreme Court of Illinois as Downen v. Rayburn, 214 Ill. 342, 73 N. E. 364, to the effect that a description of the intended use following the grant is not to be construed as a limitation upon the use of the grant unless the contrary clearly appears. And, in the light of the authoritative Illinois decisions, this Court has erred in failing to hold that a contrary intention is not evidenced upon the face of the conveyances in question.

2

This Court, in construing the language, "a strip of land for right of way for said railroad company sixty feet wide over and across the * * *," has erred in holding that the words "over and across" have reference to "a strip of land" and in effect signifies surface rights only; and the Court has erred in failing to find that the language quoted is equally susceptible of an interpretation to the effect that the words "over and across" have reference to the right of way and are intended merely to distinguish and locate by use the particular strip of land conveyed.

3

The Court erred in failing to hold that, regardless of the final outcome of this case, the bankruptcy court had jurisdiction to determine whether its trustee was in actual or constructive possession, and, pending determination of this issue, which involved both facts and law, had jurisdiction to vest trustee with the powers of a receiver pendente lite for the purpose of conserving the oil underlying

[fol. 192] the right of way and directing that the cost thereof be a charge upon the proceeds from the sale of the oil so removed; and in reaching its conclusion the Court has erred in failing to distinguish between cases where the lower court has no jurisdiction and cases such as the one at issue, where the lower court does have jurisdiction at least for the purpose of determining the issues of fact and law respecting possession.

4

This Court has erred in holding that the lower court was without jurisdiction even to determine the question of possession, notwithstanding the voluntary appearance of appellants and their unreserved participation in the submission of this issue to the lower court.

5

The Court has erred in directing the court below to dismiss the petition for want of jurisdiction, predicating its conclusion solely upon the language in the deeds, thus precluding any opportunity on the part of appellee to offer testimony tending to show how the grantors and their successors in interest have themselves interpreted the conveyances.

Wherefore, appellee respectfully requests the granting of this petition for rehearing.

Russell L. Dearmont, Thos. T. Railey, Attorneys for Appellee.

[fol. 193] Certificate of Counsel

I hereby certify that this petition is filed in good faith and is believed by me to be meritorious.

Thos. T. Railey.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—September 26, 1939

The petition for rehearing filed by counsel for appellee, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Com-

pany, Debtor, in these causes having been consolidated, It is now here ordered by this Court that the same, be, and it is hereby, denied.

In United States Circuit Court of Appeals

Motion of Appellee to Stay Issuance of Mandate—Filed Oct. 2, 1939

Appellee respectfully presents to the Court that on September 27, 1939, an order was entered denying Appellee's petition for rehearing, and Appellee, intending in good faith to prosecute application for certiorari to the Supreme Court of the United States, now prays for a thirty-day stay of the mandate in the above-described proceedings.

Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, by Russell L. Dearmont, Thos. T. Railey, Attorneys for Appellee.

[fol. 194] [File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 3, 1939

On Consideration of the motion of appellee for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

[fols. 195-196] In United States Circuit Court of Appeals

Order Denying Motion to Set Aside Order Staying Issuance of Mandate, on Condition, etc.—October 6, 1939

These causes came on this day to be heard on the motion of appellants to set aside the order of October 3, 1939, of this

Court, staying the issuance of mandate without requiring bond pending a petition by appellees to the Supreme Court of the United States for a writ of certiorari.

After hearing counsel, Mr. Craig Van Meter for appellants and Mr. Thomas T. Railey for appellees, It is ordered by this Court that the aforesaid motion, be, and it is hereby, denied, on condition however that no further oil be taken by appellees from the right of way involved in these causes without permission of this Court, pending petition of appellees for a writ of certiorari in the Supreme Court of the United States.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 197] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed December 4, 1939

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,888. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 481. Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor, petitioner, vs. Magnolia Petroleum Company and The Ohio Oil Company. Petition for a writ of certiorari and exhibit thereto. Filed October 23, 1939. Term No. 481, O. T. 1939.